Supreme Court, U.S.
FILED

No. 95-258

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In The

Supreme Court of the United States

October Term, 1995

JAMES E. JONES, JR., *et al.*,

Petitioners,

v.

SHANNON RICHEY FAULKNER,

and the *Petitioner,*

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this equal protection case challenging the males-only admission policy of The Citadel, the Military College of South Carolina, the questions presented are:

1. Did the courts below exceed Article III's "case or controversy" limitations on federal judicial authority by adjudicating the constitutionality of South Carolina's failure to provide an all-female military program like The Citadel, given that the plaintiffs not only did not seek the provision of such an all-female program, but consistently and unequivocally renounced it.

2. If the courts below did have jurisdiction over the issue, does a demonstrated and undisputed lack of *any* demand for an all-female military program like The Citadel provide a constitutionally adequate justification for South Carolina's failure to establish such a program.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following were parties in the courts below and join in this petition as additional petitioners: David M. Beasley, Governor of the State of South Carolina; Stanhope Spears, Adjutant General of the State of South Carolina; Barbara S. Nielsen, Superintendent of Education of the State of South Carolina; William F. Prioleau, Jr.; William E. Jenkinson III; Leonard F. Fulghum, Jr.; James M. Leland, Jr.; John A. McAllister, Jr.; David S. Boyd, Jr.; Julian G. Frasier III; James W. Bradin; Larry J. Ferguson; Steven D. Peper, Members of The Board of Visitors of The Citadel, the Military College of South Carolina; Ronald F. Gaskins, Interim Director of Admissions and Recruiting at The Citadel, the Military College of South Carolina; Claudius E. Watts III, President of The Citadel, the Military College of South Carolina, in their official capacities; The State of South Carolina; The Citadel, the Military College of South Carolina; and The Board of Visitors of The Citadel, the Military College of South Carolina.

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JAMES E. JONES, JR., *et al.*,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners James E. Jones, Jr., *et al.*, respectfully request that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit, entered on April 13, 1995.

I. OPINIONS BELOW

The opinion of the court of appeals for which review is sought is reported at 51 F.3d 440 (4th Cir. 1995) ("*Faulkner II*") and is appended to the petition for writ of certiorari filed with this Court on July 10, 1995 by Shannon Richey Faulkner, plaintiff below. Petition for Writ of Certiorari at 1a-32a, *Faulkner v. Jones*, (U.S. July 10, 1995) (No. 95-31) ("Faulkner Petition" or "Faulkner Pet."). The opinion of the United

States District Court for the District of South Carolina is reported at 858 F. Supp. 552 (D.S.C. 1994) and is appended to the Faulkner Petition at 33a-66a.

The order of the district court, dated August 17, 1993, granting Faulkner's motion for a preliminary injunction is unreported and is appended to the Faulkner Petition at 69a. The decision of the Court of Appeals, dated November 17, 1993, affirming the district court's grant of the preliminary injunction is reported at 10 F.3d 226 (4th Cir. 1993) ("*Faulkner I*") and is appended to the Faulkner Petition at 70a-100a. The decision of the Court of Appeals, dated January 11, 1994, denying petitioners' motion for a stay of the mandate in *Faulkner I* is reported at 14 F.3d 3 (4th Cir. 1994) and is appended to this petition as Appendix C (App. 15-20).

II. JURISDICTION

The judgment of the Court of Appeals was entered on April 13, 1995. On June 30, 1994, The Chief Justice granted petitioners an extension of time, through and including August 11, 1995, for the filing of a petition for writ of certiorari. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Section 2 of Article III of the United States Constitution provides, in pertinent part, that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . . "

IV. STATEMENT OF THE CASE

The litigation of this equal protection case has trailed closely behind, and in certain important respects has been governed by, the Fourth Circuit's decisions in a virtually

identical challenge to the single-gender admission policy of the Virginia Military Institute ("VMI"), the only other public males-only college remaining in this country. *United States v. Virginia*, 976 F.2d 890 (4th Cir. 1992) (*VMI I*), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2431 (1993); *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995) (*VMI II*), *petition for cert. filed*, No. 94-1941 (April 23, 1995). It is thus necessary to first describe briefly the relevant features of the *VMI* case.

A. The *VMI* Litigation

1. The United States brought an equal protection action against VMI in 1990, seeking the admission of qualified women to its all-male Corps of Cadets. After a six-day trial, the District Court for the Western District of Virginia, applying the standard enunciated by this Court in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (*Hogan*), upheld VMI's males-only admissions policy as substantially related to an important governmental interest. Based on undisputed expert testimony and studies establishing that single-sex education is pedagogically justifiable for both male and female college students, the district court held that VMI's males-only policy was substantially related to the important state objectives of increasing educational diversity and of providing the "substantial educational benefits" of single-sex education, particularly the VMI "adversative" military-style educational method. *United States v. Virginia*, 766 F. Supp. 1407, 1413, 1415 (W.D. Va. 1991). The district court also found that if VMI became coeducated, not only would the pedagogical benefits of single-sex education be lost to both sexes, but the physical and developmental differences between men and women would require "dual tracking," and ultimately abandonment, of VMI's harsh adversative system – an educational methodology that reduces the cadets to an as-equal-as-possible status by physical and mental adversity, stress, deprivation of privacy, and minute regulation of behavior. *Id.* at 1412-13. Finally, because "[t]he relief that the United States seeks in this suit is to require VMI to open its doors to women – not to force Virginia to establish an all-

female, state-supported college," the district court noted that any question relating to Virginia's failure to provide an all-female VMI-type educational program was "not an issue to be resolved in this lawsuit." *Id.* at 1415.

In *VMI I*, the Fourth Circuit affirmed the district court's findings relating to the pedagogical benefits of single-gender education and to the detrimental effect that coeducation would have upon VMI's unique program. Specifically, the Fourth Circuit upheld the district court's findings that single-sex education is "pedagogically justifiable" and that VMI's holistic, adversative system of education for men is "even more so." *VMI I*, 976 F.2d at 898. Indeed, the court affirmed the district court's findings "that VMI's mission can be accomplished only in a single-gender environment and that changes necessary to accommodate coeducation would tear at the fabric of VMI's unique methodology." *Id.* at 897. As the court of appeals explained: "It is not the maleness, as distinguished from femaleness, that provides justification for the program. It is the homogeneity of gender in the process, regardless of which sex is considered, that has been shown to be related to the essence of the education and training at VMI." *Id.* at 897. These and similar findings yielded the conclusion "that if a court were to require the admission of women to VMI to give them access to this unique methodology, the decision would deny those women the very opportunity they sought because the unique characteristics of VMI's program would be destroyed by coeducation." *Id.*

Notwithstanding its conclusion that VMI's males-only admission policy is constitutionally justified, the court ruled against the Commonwealth on the "larger question," raised *sua sponte* by the court itself, of whether Virginia had adequately justified why it offered the unique educational benefits of a single-sex VMI-type education to men but not to women. *Id.* at 898-99. The Fourth Circuit determined that the policy of educational diversity, the only justification offered by the Commonwealth, was not advanced by offering a single-sex VMI-type program to males only. With respect to remedy, the court suggested that the Commonwealth could

either coeducate VMI, "establish parallel institutions or parallel programs" for women, "abandon state support of VMI," or pursue "other more creative options or combinations." *Id.* at 900. The court thus directed the district court on remand "to require the defendants to formulate, adopt, and implement a [remedial] plan . . . . " *Id.* The Fourth Circuit stayed its mandate pending the filing of a petition for writ of certiorari. This Court later denied VMI's petition for certiorari. *Virginia Military Inst. v. United States*, ___ U.S. ___, 113 S. Ct. 2431 (1993).

2. On remand, Virginia chose to provide a single-gender program to women through the creation at Mary Baldwin College, an historically all-female private undergraduate institution, of a state-supported program known as the Virginia Women's Institute for Leadership ("VWIL"). Like VMI, the VWIL program was designed to produce "citizen soldiers" through a holistic program of single-gender undergraduate education with military training. The district court approved Virginia's VWIL plan, although the VWIL program differed significantly from VMI in its educational methods and academic offerings and requirements. *United States v. Virginia*, 852 F. Supp. 471 (W.D. Va. 1994). The court credited testimony that an all-female institution based strictly upon the adversative "VMI model" was not "achievable from the public policy perspective because it is deficient from the standpoint of attracting a sufficient clientele and from the standpoint of achieving a reasonable degree of acceptance from the Commonwealth." *Id.* at 481.

The United States appealed, and in *VMI II* the Fourth Circuit affirmed the district court's decision approving the VWIL remedial plan. In reaching this decision, the court established a new "special intermediate scrutiny test" for assessing the constitutionality of single-gender educational programs. In addition to satisfying *Hogan*'s intermediate scrutiny standard, the court of appeals required Virginia to demonstrate that "the alternatives available to members of each gender denied benefits by the classification" are "substantively comparable." *VMI II*, 44 F.3d at 1237. Applying this test to VMI's single-gender admission policy, the court of

appeals first reaffirmed its decisions in *VMI I* that "providing the option of a single-gender college education may be considered a legitimate and important aspect of a public system of higher education," *id.* at 1238, and that the males-only admissions policy is "the only way to realize the benefits of homogeneity of gender" and to "achieve the results of an adversative method in a military environment." *Id.* at 1239. Accordingly, "[i]f we ordered VMI to admit women, the program would be irrevocably altered, forever denying its unique methodology to both women and men." *Id.* at 1240. *See also id.* at 1239.

Turning to the third step of its "special intermediate scrutiny" test, the court of appeals concluded that the benefits offered to men by VMI and to women by VWIL are "substantively comparable." Noting that the differences in the two programs were "attributable to a professional judgment of how best to provide the same opportunity," the Court concluded that "the mission and goals [of the two programs] are the same, and the methodologies for attaining the goals, while different, nevertheless are reasonably calculated to succeed at each institution." *Id.* at 1241. The court relied on expert testimony that an all-female program that was identical to VMI would be impracticable because women may not respond similarly to an adversative educational approach and because such a program "would attract an insufficient number of participants to make the program work." *Id.* at 1241.

The United States has petitioned this Court for a writ of certiorari seeking review of *VMI II*. The VMI defendants have opposed the United States' petition for certiorari, but have filed a "Conditional Cross-Petition" for writ of certiorari. Both the United States' petition and the VMI defendants' conditional cross-petition are pending.

B. The Citadel Litigation

1. On March 2, 1993, Faulkner[1] commenced this action against The Citadel and its governing bodies and officers. Faulkner's complaint alleged that she had been denied admission to The Citadel Corps of Cadets based on her gender, that this denial violated her rights under the Equal Protection Clause, and that she is entitled to a permanent injunction compelling The Citadel to abolish its single-gender admissions policy and to admit her to the Corps of Cadets. On June 7, 1993, the district court granted the motion of the United States to intervene in this action in support of Faulkner and to add South Carolina as a defendant. The United States likewise sought only the abolition of The Citadel's single-gender admissions policy and the admission of qualified women to the Corps of Cadets.

On July 7, 1993, Faulkner moved for a preliminary injunction compelling her admission to day classes at The Citadel beginning in the 1993 fall semester. Faulkner expressly did not seek interim admission to the Corps of Cadets. The district court granted Faulkner's motion, but made clear that it would not have granted a preliminary injunction compelling Faulkner's interim admission to the Corps of Cadets.

The court of appeals, by a divided vote, affirmed the grant of preliminary injunctive relief. *Faulkner v. Jones*, 10 F.3d 226, 234 (4th Cir. 1993) (*Faulkner I*) (Faulkner Pet. 70a-100a). Like the district court, the panel majority concluded that admitting Faulkner to *day classes only* "does not require structural changes to The Citadel's program" and "is not tantamount at this time to integrating or altering the military program at The Citadel." *Id.* at 233 (Faulkner Pet. 79a). The panel majority also made clear that the Fourth Circuit's findings in *VMI I* regarding the benefits of single-

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[1] For the sake of clarity, we refer to Faulkner, who has also filed a certiorari petition in this case, simply as "Faulkner," to respondent United States as "United States," and to both of them collectively as "plaintiffs." We refer collectively to The Citadel and the State of South Carolina as "defendants."

gender education and the adverse effects of coeducation at VMI would apply no less in this virtually identical case. *Id.* at 232 (Faulkner Pet. 78a). Thus, the panel majority reaffirmed the Fourth Circuit's earlier finding that "with respect to both VMI's military and educational aspects, . . . a single-gender policy was justified by an important state purpose and . . . the state could appropriately offer a single-gender military education." *Id.* at 231-32 (Faulkner Pet. 76a). The court also reaffirmed its conclusion in *VMI I* that "coeducation would so fundamentally change VMI's military program that neither males nor females would receive the training which VMI offered through its single-gender program." *Id.* at 231 (Faulkner Pet. 76a).

In remanding the case to the district court for a trial on the merits, the court noted that South Carolina had thus far provided "no explanation for the failure to offer women the same opportunity to participate in a single-gender institution and achieve similar goals as that afforded to men at The Citadel." *Id.* at 232 (Faulkner Pet. 78a). The court made clear, however, that the issue of sufficient demand for an educational opportunity is relevant to that inquiry:

> [A]ny analysis of the nature of a separate facility provided in response to a justified purpose, must take into account the nature of the difference on which the separation is based, the relevant benefits to and the needs of each gender, *the demand (both in terms of quality and quantity)*, and any other relevant factor.

Id. at 232 (Faulkner Pet. 77a-78a) (emphasis added).

The Citadel unsuccessfully sought rehearing and a stay of the court of appeals' mandate. *Faulkner v. Jones*, 14 F.3d 3 (4th Cir. 1994) (App. C); *Jones v. Faulkner*, ___ U.S. ___, 114 S. Ct. 872 (1994).

2. In light of the Fourth Circuit's rulings in *Faulkner I*, the district court limited the liability portion of the trial to the adequacy of "justification" for not offering an all-female military program like The Citadel to women. *Faulkner v. Jones*, 858 F. Supp. 552, 555 (D.S.C. 1994) (Faulkner Pet. 36a). The undisputed evidence demonstrated that the current

absence of such a program results not from intentional discrimination against women in higher education, but from an absence of any significant demand on the part of women to support such an institutional program.[2] In its findings of fact, the district court specifically concluded that "[i]t is and has been the policy of the State of South Carolina to provide educational opportunities in its system of higher education when dictated by its policies of responding to reasonable demand, student choice, institutional autonomy, diversity, and economy of resources." *Id.* at 560 (Faulkner Pet. 46a); *see also id.* at 564 (Faulkner Pet. 54a). The district court also specifically found that "[t]here does not appear to be any substantial interest in South Carolina for the establishment of an all-female military institution like The Citadel." *Id.* at 560 (Faulkner Pet. 46a). Notwithstanding these findings, the district court concluded, as a matter of law, that the level of demand for an all-female Citadel is irrelevant as a justification for South Carolina's failure to provide such an institution. *Id.* at 564-65 (Faulkner Pet. 55a-57a), citing *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *McCabe v. Atchison, T. & S. F. Ry.*, 235 U.S. 151 (1914). Accordingly, the district court held that the State had violated the Equal Protection Clause.

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[2] This evidence included the testimony of two former governors of South Carolina, two members, including the chairman, of the Legislative Study Committee on Single-Gender Educational Opportunities for Women ("Committee"), the chairman of the South Carolina Commission on Higher Education, and a professor of educational leadership and policy studies at Arizona State University. The State also introduced the report of the Committee, a ten-member committee established by the General Assembly to study and evaluate single-gender educational opportunities for women. J.A. 1105. ("J.A." refers to the Joint Appendix filed in the court of appeals in *Faulkner II*). The Committee's report, which was accepted by the General Assembly, notes that "the Committee found no indications of interest by women in a single-gender military education." J.A. 1120. The Committee's report also noted that South Carolina had supported single-gender education for women at Winthrop College from its founding in 1891 until 1974, when, due to a marked decline in student demand and enrollment and to a resulting desire to serve a broader student population, it obtained legislative authorization to become coeducational. J.A. 1084-85.

Turning to the issue of remedy, the district court ordered that Faulkner be admitted immediately to The Citadel Corps of Cadets. With respect to women other than Faulkner, the court ordered that defendants formulate, adopt, and implement a remedial plan that conforms with the Equal Protection Clause by the beginning of the 1995-96 school year. *Id.* at 569 (Faulkner Pet. 65a-66a).

After granting a stay of the district court's order directing Faulkner's immediate admission into the Corps of Cadets, *Faulkner v. Jones*, No. 94-1978, slip. op. (4th Cir. Aug. 12, 1994) (Faulkner Pet. 102a-103a), a divided panel of the Fourth Circuit affirmed. *Faulkner II*, 51 F.3d at 450 (Faulkner Pet. 18a). The court reaffirmed and readopted its holdings in *VMI I*, *Faulkner I*, and *VMI II* regarding the benefits and importance of single-gender education, the adverse effects upon institutions such as VMI and The Citadel of coeducation, and the need for a state to justify the maintenance of a single-gender educational program without providing a substantively comparable program for members of the other gender. *Id.* at 443 (Faulkner Pet. 3a-4a).

On the issue of South Carolina's justification for not offering an all-female military program like The Citadel, all three members of the panel had a different view concerning the relevance of the State's evidence of a lack of student demand. Judge Hall, in a concurring opinion, expressed the view that The Citadel's males-only admission policy is *per se* unconstitutional and that any inquiry into the State's failure to provide a parallel institution for women is therefore "irrelevant." *Id.* at 450-51 (Faulkner Pet. 18a-20a). Judge Niemeyer, who authored the lead opinion, voiced disagreement with the district court's legal conclusion that student demand is irrelevant to the equal protection analysis, but decided that the issue need not be resolved because the State had not presented evidence "that there was an absence of demand among women for public single-gender education." *Id.* at 444-45 (Faulkner Pet. 6a-8a). Judge Niemeyer thus defined the relevant inquiry as whether there was significant female demand "for public single-gender education" in general, rather than for an all-female military program like The Citadel. Judge Hamilton, in

dissent, focused on the absence of student demand for an all-female military program like The Citadel, finding that the "record more than adequately supports [defendants'] position; indeed, Faulkner conceded this point, and the district court found it as a fact. There is simply and indisputably *no* demand in South Carolina for a Citadel-type educational program for women." *Id.* at 455 (Faulkner Pet. 28a). (Hamilton, J., dissenting) (emphasis in original). Judge Hamilton also concluded that requiring the State to establish an all-female educational program "is doubly futile because Faulkner has repudiated both remedies, *i.e.*, a program similar to VWIL and a 'female Citadel.' " *Id.* at 456 (Faulkner Pet. 30a).

The panel majority modified the district court's remedy decision, ordering that unless South Carolina provided by August 1995 an all-female educational program that met the criteria of *VMI II*, Faulkner must be admitted into the Corps of Cadets. *Id.* at 450 (Faulkner Pet. 18a). With respect to all other women, the court of appeals remanded the case with instructions that the district court establish a schedule for South Carolina to formulate, adopt, and implement a remedial plan. *Id.*

3. Since the issuance in April of the Fourth Circuit's decision in *Faulkner II*, defendants have sought to comply with the decision by doing everything within their power to ensure that an all-female program meeting the requirements announced in *VMI II* would be devised, adopted, approved, and implemented by August 12, the day on which new Cadets are required to report to campus. On June 5, defendants submitted to the district court a proposed remedial plan proposing the creation of the South Carolina Institute of Leadership for Women ("SCIL") at Converse College, an historically all-female private undergraduate institution. Modeled closely on VWIL, SCIL was designed by experts in women's education to provide women a publicly supported, single-gender program of undergraduate education with military training. Like VWIL, the SCIL program does not incorporate the adversative educational method and differs from The Citadel in certain other respects. Defendants have also taken significant steps to implement the proposed remedial plan so that the

SCIL program could be operational by the fall 1995 semester. Thus, Converse has entered into contracts with South Carolina and The Citadel for the establishment of the SCIL program. Defendants have also provided for funding for the SCIL program. The Citadel has provided initial funding of $5 million, and has agreed to provide additional funding in the future. In addition, on June 13, 1995, the South Carolina General Assembly passed a budget bill which includes the necessary recurring and nonrecurring appropriations for the SCIL program.

Despite these efforts, however, the district court, in an order issued July 24, "conclude[d] that it cannot consider the issues relating to the approval and implementation of South Carolina's Proposed Remedial Plan prior to August 12, 1995." Accordingly, the district court ordered The Citadel to admit Faulkner to the Corps of Cadets on August 12.[3]

V. REASONS FOR GRANTING THE PETITION

While the parties to this case have agreed on nothing else, they are united in the view that this case raises questions of exceptional national importance amply warranting this Court's review. Last month, Faulkner filed a petition for writ of certiorari, arguing essentially that she is entitled under the Equal Protection Clause to admission to The Citadel's Corps of Cadets and that the Fourth Circuit erred in authorizing the State of South Carolina to remedy its alleged constitutional violation by establishing an all-female educational program "substantively comparable" to The Citadel. *See* Faulkner Petition at 14. The United States, which is an intervening plaintiff in this case and is the sole plaintiff in the *VMI* case, is advancing largely the same argument in a certiorari petition seeking review of the Fourth Circuit's decision in *VMI* approving the establishment of the Virginia Women's Institute

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[3] Although the district court has not yet conducted a remedial trial, Converse College will commence the SCIL program on September 1, 1995. As of August 4, 1995, 41 young women have applied for admission to SCIL, and 23 have been admitted for the 1995 fall semester.

for Leadership at Mary Baldwin College to remedy the Commonwealth of Virginia's purportedly unconstitutional decision to offer " 'the unique benefits of a VMI-type education to men and not to women.' " *See* Petition for Writ of Certiorari at 6, *United States v. Virginia*, (April 23, 1995) (No. 94-1941) ("U.S. Petition"), quoting *VMI I*, 976 F.2d at 899.

We, too, believe that this case warrants plenary review, but for other reasons. The truly certworthy questions presented by this case, however, relate to the issue of liability, rather than remedy. They are: (1) did the courts below exceed their jurisdiction in this case by reaching the issue of whether the absence of an all-female military program like The Citadel is constitutionally justified, and (2) if the courts below did have jurisdiction over the issue, does a demonstrated and undisputed lack of *any* demand for an all-female military educational program like The Citadel provide a constitutionally adequate justification for the State's failure to establish such a program.

With respect to the question of justiciability, throughout this litigation, from the filing of her complaint to the filing of her certiorari petition, Faulkner has sought only one thing: admission to The Citadel's Corps of Cadets. She has not challenged South Carolina's failure to provide an all-female educational program like The Citadel's. To the contrary, she has made emphatically clear that she would not be interested in attending an all-female Citadel even if one existed and that she will not enroll in any all-female program that South Carolina may develop pursuant to the Fourth Circuit's ruling in this case. Similarly, the United States' complaint-in-intervention alleges only that The Citadel's exclusion of qualified females from the Corps of Cadets violates the Equal Protection Clause, and it has consistently maintained that admission of Faulkner and other qualified females into the Corps is the only appropriate remedy. The court of appeals, having concluded that The Citadel's males-only admission policy satisfies the equal protection standard established by this Court in *Hogan*, fully resolved the only claim placed before it – and the only claim that these plaintiffs had standing to place before it. There is not now, and never has been, a

"case or controversy" between the parties to this litigation on the entirely distinct question, injected *sua sponte* into this case by the court of appeals, whether the State of South Carolina is constitutionally obliged, in light of The Citadel's males-only admission policy, to establish an all-female military program like The Citadel.[4]

Quite apart from the fact that the courts below adjudicated a constitutional claim that no one has made, they decided that claim incorrectly. For even if Faulkner had complained about the absence of an all-female military institution like The Citadel, the State established at trial an "exceedingly persuasive justification" for its failure to establish such a program for women. As Judge Hamilton put it in dissenting from the decision below: "There is simply and indisputably *no* demand in South Carolina for a Citadel-type educational program for women." *Faulkner II*, 51 F.3d at 455 (Faulkner Pet. 28a) (Hamilton, J., dissenting) (emphasis in original). If the court of appeals was correct in holding that The Citadel's males-only admission policy is constitutionally justified, and we submit that it was, it follows as a matter of common sense that the State is not constitutionally precluded from providing to males a pedagogically beneficial single-sex educational program for which there is large student demand, on the ground that the State does not also offer to females the same single-sex educational program for which there is no significant demand.

The short of our petition is this: if there is any room at all under our Constitution for public single-sex higher education, then surely The Citadel's Corps of Cadets qualifies. Before

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[4] The justiciability in this case of the "claim" challenging the absence of an all-female military program like The Citadel bears on the subject matter jurisdiction, under Article III, of the courts below and of this Court. Accordingly, this Court can reach the issue even though it was not raised or addressed below. *See, e.g., United States v. Hays*, ___ U.S. ___, 63 U.S.L.W. 4679, 4681 (1995); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-31 (1990). *See also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 260 (1977); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981).

The Citadel's 153-year old single-sex policy, and its acknowledged pedagogical benefits, passes into history, this Court should review and determine the merits of the issues raised in this case.

A. There Is No Justiciable Issue In This Case Concerning The Absence Of An All-Female Military Institution Like The Citadel

1. The exclusive purpose of this lawsuit is described succinctly in the opening paragraph of Faulkner's complaint: "Plaintiff seeks admission to The Corps of Cadets." App. 2. Alleging that The Citadel had initially accepted her application for admission until it learned her sex, Faulkner's complaint makes a single legal claim – that defendants "in denying Plaintiff admission to the Corps of Cadets, discriminate[d] against the Plaintiff on the basis of sex in violation of the Equal Protection Clause . . . ." App. 6. Her prayer for injunctive relief sought only an order admitting her to The Corps of Cadets and enjoining the defendants "from discriminating on the basis of sex in admitting qualified women to the Corps of Cadets." App. 7. The United States' complaint-in-intervention, likewise, is concerned solely with The Citadel's "policy of restricting admission to . . . the Corps of Cadets . . . to males only . . . ." App. 12. The United States specifically sought an order declaring unconstitutional The Citadel's policy of "refusing to admit or consider the admission of qualified females to The Citadel" and enjoining the defendants from discriminating on the basis of sex "in the operation of The Citadel." App. 13. Neither complaint contains an allegation relating in any way to South Carolina's failure to establish an all-female military program like The Citadel, let alone a request that the State be ordered to establish one.

Plaintiffs have never strayed from the course established in their complaints. To the contrary, at every stage of this litigation Faulkner has emphatically made clear that she has

no interest whatever in attending an all-female military program like The Citadel. For example, she testified in the district court as follows:

> Q. Now, what is your purpose in bringing this lawsuit?
>
> A. To be able to enter The Corps of Cadets and receive my full education from The Citadel.
>
> . . . .
>
> Q. You will not be happy going to a single-sex, all-female military college in South Carolina?
>
> A. I don't want a single-gender education.
>
> Q. And if South Carolina provided you with an all-female military college, that would not satisfy you?
>
> A. No, sir, it would not.[5]

2. Despite Faulkner's unequivocal denial of any interest in an all-female military program like The Citadel, the courts below required defendants to justify, in a two-week trial, the

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[5] J.A. 875, 884-85. *See also e.g.*, Brief of Appellee Shannon Faulkner at 1, *Faulkner II* (October 10, 1994) ("She [Faulkner] seeks a permanent injunction compelling her admission to The Citadel's Corps of Cadets. Ms. Faulkner does not seek a sex-segregated education. She desires access to the rigorous and disciplined education in a military environment offered by The Corps of Cadets program, which Defendants concede is unique in South Carolina."); Faulkner Petition at 19 ("Once a federal court finds that a state has unlawfully excluded a group of students from a public educational program, the only appropriate remedy is for the state to admit the excluded individuals and to remedy the effects of the prior discrimination."). Likewise, not only has the United States never sought the establishment of an all-female military program like The Citadel, it has consistently maintained that coeducation of The Citadel's Corps of Cadets is the only adequate remedy for defendants' alleged constitutional violation. *See, e.g.*, United States post-trial proposed findings of fact and conclusions of law at 85, ¶ 53 (June 14, 1994) ("Consequently, the admission of women to The Corps of Cadets, the remedy urged by plaintiff and the United States, is the only feasible remedial option before this Court."); Brief for the United States as Appellee at 40, 42-43, *Faulkner II* (October 10, 1994); Oral Argument Transcript at 35, *Faulkner II* (argument of Thomas Chandler, counsel for United States) (Jan. 30, 1995) ("Obviously, from the beginning our position is that the women need, are entitled to go to VMI or Citadel because that's the only remedy for their constitutional rights.").

State's failure to establish such a program. In so doing, the courts were proceeding in obedience to the Fourth Circuit's prior decision in *VMI I*, which committed the same jurisdictional error. As discussed earlier, *supra* at 3-4, in that case, as here, the United States focused its equal protection challenge exclusively on VMI's single-sex admission policy, and it consistently argued that coeducation is the only constitutionally adequate remedy.[6] Accordingly, the district court correctly concluded that the question whether the Commonwealth of Virginia "must operate a state-supported, all-female college is not an issue to be resolved in this lawsuit." *United States v. Virginia*, 766 F. Supp. at 1414-15. The Fourth Circuit, however, did not hesitate to resolve this issue, notwithstanding the fact that no one had raised it. After concluding that VMI's males-only admission policy was constitutionally justified under the equal protection standard established in *Hogan*, the court of appeals ruled against Virginia on the "larger question" of whether Virginia's failure to offer a single-sex VMI-type educational program to women was constitutionally justified by the Commonwealth's articulated goal of providing diversity in educational programs.

In this case, given the Fourth Circuit's binding precedent in *VMI I*, the only liability issue for trial was the adequacy of South Carolina's "justification" for not offering women an all-female military program like The Citadel. In reaching and adjudicating an issue that no party had raised, concerning a program that no plaintiff wanted, the courts below plainly exceeded the "case or controversy" limitation on federal judicial authority.

3. "The power to declare the rights of individuals and to measure the authority of governments . . . 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.' " *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982), quoting *Chicago &*

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[6] *See* U.S. Petition at 26 n. 23 ("From the inception of this litigation, the United States has consistently sought admission of women to VMI as the appropriate remedy.")

Grand Trunk R. Co. v. Wellman, 143 U.S. 339, 345 (1892). It follows from this "bedrock" principle of Article III that "the party who invokes the court's authority [must] 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.' " *Id.* at 472, quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). The injury alleged must be "distinct and palpable," it must be "fairly traceable to the defendant's allegedly unlawful conduct," and it must be "likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citations omitted). And "it is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *Hays*, 63 U.S.L.W. at 4681 (citations and internal quotations omitted). These Article III standing principles "appl[y] with as much force in the equal protection context as in any other." *Id.*

The most critical point for purposes of this case is simply that the injury alleged by the plaintiff must be "personal." The inquiry into a plaintiff's standing requires, at its threshold, a careful judicial examination of a complaint's allegations," *Allen*, 468 U.S. at 752, to ensure not only that it alleges "an injury to a cognizable interest," but that "the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). It follows that a plaintiff challenging governmental action withholding a particular benefit must allege that he is in line to receive the benefit if he prevails. For example, over a century ago, this Court dismissed a challenge to the constitutionality of a state law disallowing a certain property tax deduction because the plaintiff had not alleged that he would be eligible to take the deduction but for the challenged statute. *Board of Supervisors v. Stanley*, 105 U.S. 305 (1882). Noting that the plaintiff would pay "the same amount of tax" and thus "would be in no better condition if the [challenged] law expressly authorized him to make the deduction," the Court asked:

> What legal interest has he in a question which only affects others? Why should he invoke the protection of the act of Congress in a case where he has no

> rights to protect? Are courts to sit and decide abstract questions of law in which the parties before it show no interest, and which, if decided either way, affect no right of theirs?

Id. at 311. Similarly, in *Sierra Club*, this Court held that an environmental organization lacked standing to challenge the commercial development of certain property within a national forest because the organization "failed to allege that it or its members would be affected in any of their activities or pastimes by the . . . development. Nowhere in the pleadings or affidavits did the [plaintiff] state that its members use [the property] for any purpose, much less that they use it in any way that would be significantly affected by the proposed [development]." *Id.* at 735. A host of other cases are to the same effect. *See, e.g., Hays*, 63 U.S.L.W. at 4682 (plaintiffs lacked standing to challenge purported racial gerrymandering when they did not live in challenged district); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (environmental organizations lacked standing to seek declaration concerning extraterritorial application of Endangered Species Act because allegations that members intend to visit foreign countries in the future insufficient to show "actual or imminent injury"); *Allen*, 468 U.S. at 755 (plaintiffs' allegations of stigmatization insufficient to confer standing because plaintiffs not personally denied equal treatment by the challenged discriminatory conduct); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979) (labor union lacked standing to challenge arbitration provision of state labor law because employers may elect responses to an arguably unlawful strike other than seeking an injunction and agreeing to arbitrate); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (plaintiffs lacked standing to challenge racial discrimination in administration of city's criminal justice system because they had not alleged that they had been or would likely be subject to the challenged practices); *Roe v. Wade*, 410 U.S. 113 (1973) (married couple lacked standing to challenge anti-abortion statute because potential future injury too speculative); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (plaintiff lacked standing to challenge club's racially discriminatory membership policies because he had never applied for

membership); *Cf. United States v. SCRAP*, 412 U.S. 669 (1973) (allegations that defendant's actions would directly harm plaintiffs in their use of the natural resources of the Washington area sufficient to confer standing).

4. In this case, it is clear that Faulkner and the United States have alleged facts demonstrating their standing to litigate the only claim that they have raised – the constitutionality of The Citadel's single-sex admission policy. It is equally clear, however, that there is no "case or controversy" here concerning the State's failure to establish an all-female military program like The Citadel. First, neither plaintiff has even *asserted* a claim challenging the absence of such a program. Accordingly, as the district court in the *VMI* case concluded, "this issue is not before the Court." *United States v. Virginia*, 766 F. Supp. at 1414. *See Babbitt*, 442 U.S. at 305 (1979) (although lower court had on its own motion invalidated arbitration provision of state labor law, because plaintiffs "never contested the constitutionality of the arbitration clause . . . any ruling on the . . . provision would be wholly advisory").

Second, even if plaintiffs had asserted a claim challenging South Carolina's failure to provide an all-female military program like The Citadel, they plainly have not alleged facts that would support their standing to litigate such a claim. Neither complaint alleges that Faulkner (or the women whose interests are represented by the United States) personally desires to attend an all-female military program like The Citadel, that she would qualify for admission to such a program, and that she will seek to enroll in such a program if she prevails on her claim. To the contrary, plaintiffs have made clear that their sole interest is in admission of qualified females to The Citadel Corps of Cadets and that establishment of a separate program for women, as the United States put its, "plainly does not cure the constitutional violation that gave rise to this case – the complete exclusion of women from [The Citadel's] unique and celebrated program." U.S. Petition at 12. In other words, even if South Carolina had always had an all-female military program like The Citadel, plaintiffs' constitutional claim in this case would not have been affected in

the slightest. Clearly, then, plaintiffs here do not possess "such a personal stake in the outcome of the ["all-female Citadel"] controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).[7]

Finally, adjudication in this case of the question whether defendants were constitutionally required to establish an all-female military program like The Citadel violates the "redressability" requirement of Article III standing. "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party. . . . " *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Thus, a plaintiff, "to justify exercise of the court's remedial powers *on his behalf*," *id.* at 498-99 (emphasis supplied), must show that his alleged injury "is likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751. In this case, any "remedy" ordering South Carolina to establish an all-female military program like The

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[7] The record of the trial in this case demonstrates starkly the validity of the theory of Article III's standing requirement. The requirement that the plaintiff demonstrate a distinct and palpable *personal* injury from the defendant's allegedly illegal conduct "reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order." *Valley Forge Christian College*, 454 U.S. at 473. Only if the plaintiff is actually one of those persons can the courts be assured "that the legal questions presented . . . will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.* at 472. Here, in the trial on the State's failure to provide an all-female military program like The Citadel, Faulkner and the United States were putatively representing the interests of women who *desire* such a program and would seek to enroll in such a program if it existed. Because they actively oppose the establishment of such a program, however, Faulkner and the United States resisted rather than promoted the need for and wisdom of such a program at every stage of the proceedings. For example, plaintiffs presented evidence that the establishment of an all-female institution would *stigmatize* any woman who attended such a program. J.A. 804; 812. Similarly, the plaintiffs' expert testified only as to potential demand among women for a coeducational Citadel. J.A. 851. The plaintiff made no attempt to establish the potential demand for an all-female military program like The Citadel. In short, in the proceedings before the district court, the defendants have been engaged in the futile exercise of trying to satisfy parties who expressly will not be satisfied.

Citadel will not "redress or otherwise . . . protect against injury to the complaining part[ies]." *Warth*, 422 U.S. at 499.[8]

B. The Absence Of An All-Female Military Institution Like The Citadel Is Constitutionally Justified By An Absence Of Student Demand For Such A Program

If the courts below, contrary to our submission above, had jurisdiction in this case to reach the question whether the absence of an all-female educational program is constitutionally justified in this case, we submit that they resolved it incorrectly. Our argument has two elements. First, we submit that a state can have no obligation under the Constitution to establish an educational program of *any kind* if there is no significant student demand for the program. Second, we submit that the inquiry relating to demand, in determining whether the State has any liability under the Equal Protection Clause in this case, is defined and delimited by the equal protection claim advanced by the plaintiffs in this case. Accordingly, the only demand inquiry that may be relevant to Faulkner's equal protection claim is demand for an all-female military program that mirrors The Citadel in its mission, its goals, and its educational philosophies and methodologies. Because there is no significant demand for an "all-female Citadel" in South Carolina, the absence of such a program does not violate the Equal Protection Clause. We elaborate on each of these points below.

1. In *Faulkner I*, the court of appeals made clear that the trial in this case would be governed by its holdings in *VMI I* (1) that "coeducation would so fundamentally change VMI's

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[8] Viewed from another perspective, the relief which Faulkner and the United States *have* requested – coeducation of The Citadel Corps of Cadets – would not redress the only injury that could be caused by South Carolina's failure to offer an all-female military program like The Citadel, *i.e.*, the lack of an opportunity for women to attend a *single-gender*, Citadel-type educational institution. *Cf. Allen*, 468 U.S. at 753 n.19 (The "redressability" component "of the constitutional standing inquiry . . . examines the causal connection between the alleged injury and the judicial relief *requested*.") (emphasis supplied).

military program that neither males nor females would receive the training which VMI offered through its single-gender program"; (2) that "homogeneity of gender . . . ha[d] been shown to be related to the essence of the education and training at VMI"; (3) that "scientific studies . . . supported the conclusion that single-sex education is pedagogically justifiable both for males and females"; (4) that, accordingly, "a single-gender policy was justified by an important state purpose and that the state could appropriately offer a single-gender military education"; but (5) that "Virginia's decision to offer this unique type of education only to men" was not adequately justified by its goal of providing diversity in educational offerings. *Faulkner I*, 10 F.3d at 231-32 (Faulkner Pet. 75a-77a). The Fourth Circuit specifically noted that the inquiry into a State's decision to provide single-sex facilities or programs "must take into account the nature of the difference on which the separation is based, the relevant benefits to and the needs of each gender, the *demand* (both in terms of quality and quantity), and any other relevant factor." *Id.* at 232 (Faulkner Pet. 77a-78a). (emphasis added).[9]

As previously noted, the trial on liability was thus limited by the district court to the issue of the State's "justification" for not offering an all-female military institution like The Citadel, and the central focus of the parties' evidentiary presentations was on the issue of female demand. The State's evidence demonstrated that there is not now, and never has been, any interest at all in an all-female Citadel in South Carolina, let alone enough demand among women to make such a program pedagogically or economically viable. *See* note 2, *supra*.[10]

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[9] Judge Hamilton, in dissent, specifically suggested that South Carolina's failure to establish an all-female military program like The Citadel would be constitutionally justified by proof of "a lack of sufficient interest by women for such an institution." 10 F.3d at 240 (Faulkner Pet. 94a).

[10] The record in this case is indisputably clear that the overall educational benefits of South Carolina's system of higher education flow evenly to men and women. Indeed, in some respects, South Carolina's system of higher education benefits women to a greater degree than it benefits men. In the 1992-93 academic

Neither Faulkner nor the United States made any attempt to rebut the State's evidence of lack of demand for an all-female military program like The Citadel. To the contrary, both plaintiffs *corroborated* this evidence, making clear that neither Faulkner herself nor the women represented by the United States had any interest in attending such an institution. Rather, Faulkner and the United States focused their efforts at trial on attempting to establish that there is female demand for *coeducation* at The Citadel.

2. In its findings of fact, the district court specifically concluded that "[i]t is and has been the policy of the State of South Carolina to provide educational opportunities in its system of higher education when dictated by its policies of responding to reasonable demand, student choice, institutional autonomy, diversity, and economy of resources." 858 F. Supp. at 560 (Faulkner Pet. 46a); *see id.* at 564 (Faulkner Pet. 54a). The district court also specifically found that "[t]here does not appear to be any substantial interest in South Carolina for the establishment of an all-female military institution like The Citadel." *Id.* at 560 (Faulkner Pet. 46a). Notwithstanding these findings, the district court concluded, as a matter of law, that the lack of demand for an all-female Citadel is irrelevant as a justification for the State's failure to provide such a program. *Id.* at 564-65 (Faulkner Pet. 55a-57a). The court based its ruling on pre-*Brown v. Board of Education*, 347 U.S. 483 (1954), decisions of this Court holding that limited demand among blacks did not excuse a State's failure to provide "separate-but-equal" educational programs and facilities for those blacks who sought them. *See Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *McCabe v. Atchison, T. & S. F. Ry.*, 235 U.S. 151 (1914).

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year, for example, South Carolina awarded women 64% of the state's tuition grants (J.A. 1009); 71,015 women and 54,896 men enrolled in South Carolina public institutions of higher education (J.A. 995); and 8,390 women, as compared with 6,551 men, were awarded degrees in South Carolina. (J.A. 991.) South Carolina also showed that it provides public support for single-gender education for women through its tuition grants program.

In the court of appeals, only two members of the panel addressed the district court's findings concerning demand.[11] Judge Niemeyer, author of the majority opinion, first expressed doubt about the validity of the district court's legal conclusion that the question of demand is constitutionally irrelevant:

> For example, if a state chooses to offer single-gender education to each gender and if no person of one gender applies, is the state therefore precluded from offering single-gender education to the other gender? The question becomes yet more complex when we consider a single-gender educational program which requires a substantial outlay of capital. May the state require as a condition of providing the program that a minimum number of each gender, necessary to render the program viable, apply?

51 F.3d at 445 (Faulkner Pet. 7a-8a). Judge Niemeyer did not resolve this "difficult legal issue," however, because he concluded that the State had "failed to present evidence from which the court could conclude that there was an absence of demand among women *for public single-gender education*." *Id.* at 444-45 (emphasis added) (Faulkner Pet. 8a-9a). It is important to note that Judge Niemeyer did not question – and in light of the undisputed record in this case, could not responsibly have questioned – the validity of the district court's finding that there is no significant interest in an all-female military institution like The Citadel. Rather, Judge Niemeyer focused on the broader (and we believe irrelevant) issue of female demand for single-gender education in general. With the inquiry thus broadly defined, Judge Niemeyer concluded that "the state's failure to offer single-gender education to women" is not justified since "an absence of demand among women for such education has not been demonstrated." *Id.* at 446 (Faulkner Pet. 9a).

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[11] In a concurring opinion, Judge Hall expressed the view that The Citadel's males-only admission policy is *per se* unconstitutional and that any inquiry into the State's failure to provide an institution for women is therefore "irrelevant." 51 F.3d at 450-51 (Faulkner Pet. 18a-20a).

Judge Hamilton, in contrast, focused in his dissenting opinion on female demand for an all-female military program like The Citadel. Noting that in the *VMI* case, "the issue of demand was neither raised nor addressed," *id.* at 454 (Faulkner Pet. 26a), Judge Hamilton emphasized that "The Citadel put on unrebutted evidence" of the lack of female demand for an all-female Citadel. *Id.* at 453 (Faulkner Pet. 23a). Accordingly, the pertinent demand issue was not in dispute: "[A]s all parties and the district court agree, there is absolutely no demand for a 'female Citadel.' " 51 F.3d at 456 (Faulkner Pet. 30a). Because "lack of demand is a gender-neutral, nonin-vidious, substantial justification" for not providing a Citadel-type institution for women, Judge Hamilton concluded that the State had not offended the Equal Protection Clause. *Id.*

3. We submit that the lack of demand in South Carolina for an all-female military institution like The Citadel, which was amply demonstrated by unrebutted evidence at trial, constitutes a complete defense to any claim that the absence of such a program in South Carolina violates the Equal Protection Clause.[12] The common sense of the matter is reflected in the question, asked by Judge Niemeyer and excerpted above (*supra* at 25), whether a state is constitutionally precluded from providing to males (or females) a pedagogically beneficial single-sex educational program for which there is a large student demand if the state does not also offer to females (or males) a single-sex educational program for which there is no significant demand, and which, therefore, would be empty or virtually so. The Equal Protection Clause does not require that state officials suspend their common sense, in the field of

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[12] It is clear that the State has applied the gender-neutral criterion of student demand in a gender-neutral manner. The State introduced evidence that if the levels of demand by male and female students for a single-sex Citadel-type educational program had been reversed, the State's decisions concerning educational offerings would likewise have been reversed. For example, former Governor West testified at the trial that "if The Citadel had been vacating barracks and not using the facilities, then [the State] probably would have" examined the continued viability of The Citadel, just as the State reexamined the single-gender status at all-female Winthrop College when enrollment at that school declined. J.A. 361. *See also* J.A. 525, 540-43.

education or in any other context in which single-sex facilities or activities are supported by an "exceedingly persuasive justification." The contrary reasoning of the district court and Circuit Judge Hall casts doubt on the validity of a range of governmental activities in which programs or facilities are provided only for one sex, such as the provision of shelters for battered women.[13]

This Court's race discrimination cases from the separate-but-equal era do not counsel otherwise. *See Missouri ex rel. Gaines*, 305 U.S. at 350-51; *McCabe*, 235 U.S. at 101. Under the pre-*Brown* equal protection standard applicable in those cases, a state's exclusion of blacks, even a single black, from a state-supported educational program was permissible *only* if the state provided a separate-but-equal program to blacks. Separation of the races does not confer any benefit. Separation of the sexes in single-gender education, however, has been proven to be pedagogically beneficial to many college students, both male and female. Accordingly, the pre-*Brown* race cases are devoid of analytical force and irrelevant to Faulkner's and the United States' claims. Furthermore, the pre-*Brown* cases are justly discredited, and there is and can be no justification for excluding an individual from a state-supported educational program on the basis of race.

This Court has long recognized, however, that "where [a] gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances," the gender classification should be upheld. *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981) (plurality opinion). In keeping with this point, this Court has made clear that single-gender educational programs

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[13] *See also Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1995) (absent significant demand among female prisoners, state need not provide same training programs at all-female prison that are provided at all-male prison), *cert. denied*, ___ U.S. ___, 1995 U.S. LEXIS 1538 (U.S. 1995); *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) (upholding exclusion of males from all-female volleyball team notwithstanding absence of any all-male volleyball team); *but see, e.g., Saint v. Nebraska School Activities Ass'n*, 684 F. Supp. 626 (D. Neb. 1988) (unconstitutional to exclude females from male wrestling team where no female wrestling team).

are not *per se* unconstitutional, but rather are permissible if they are substantially related to the achievement of important governmental objectives. *Hogan*, 458 U.S. at 730. In upholding the males-only admission policies of both The Citadel and VMI, the Fourth Circuit found, based on an unrebutted record of expert testimony and scholarly literature, that a single-sex educational environment is pedagogically beneficial to a substantial number of college students, both male and female. The court of appeals also held, again based on largely uncontradicted evidence, that the pedagogical benefits of single-sex higher education, and especially the benefits to adolescent males flowing from the harsh "adversative" educational method practiced by The Citadel and VMI, would be lost if the Corps of Cadets were coeducated. Given that the admission policy is constitutionally justified, it follows as a matter of common sense that the admissions policy should not be struck down due to the absence of an all-female military program for which there is no demand.

The court of appeals' error with respect to the issue of demand, however, stems not from a failure to recognize its relevance (only Judge Hall denied the relevance of demand for an all-female military institution), but rather in broadly defining the inquiry in this case as demand among females for single-gender higher education generally, as opposed to demand for an "all-female Citadel." Even if we are wrong in our submission concerning the lack of justiciability in this case of any liability issue concerning the absence of an all-female program that both plaintiffs renounce, neither Faulkner nor the United States would alter their equal protection claim in the slightest if the State provided a wide range of all-female educational programs, including one like the Citadel's. Accordingly, the only focus on demand in the context of plaintiffs' liability claims should be that for an all-female Citadel. Faulkner is not seeking admission to an all-male liberal arts college, so the level of demand among females for such a single-sex liberal arts education is simply irrelevant to the liability claim asserted in this case.

Accordingly, the district court's finding, based on unrebutted evidence, that there is no "substantial interest in South

Carolina for the establishment of an all-female military institution like The Citadel," 858 F. Supp. at 560 (Faulkner Pet. 46a), is a complete answer to the claim that the State has a constitutional obligation to provide such a program in place of The Citadel. The court of appeals clearly erred in holding otherwise. Given that the continued existence in this country of single-gender public higher education hangs in the balance, the issues related to student demand raised by this case amply warrant this Court's plenary review.

4. We note, finally, that the relief ordered by the courts below – admission of Faulkner into The Citadel's Corps of Cadets – is wholly at war with the rationale of the Fourth Circuit's holding that The Citadel's single-sex admission policy serves legitimate, important State objectives. Again, the court of appeals correctly concluded that The Citadel's all-male adversative educational environment is "pedagogically justifiable," *VMI I*, 976 F.2d at 897, and that ordering "the admission of women to [The Citadel] . . . would deny those women the very opportunity they sought because the unique characteristics of [The Citadel's] program would be destroyed by coeducation." *Id.* Yet, the court of appeals concluded, paradoxically, that the district court here could appropriately order Faulkner's admission to The Citadel's Corps of Cadets as a "remedy" for the State's failure to provide to women a Citadel-type program – a "remedy" that the court itself recognized would not provide to Faulkner the unique and pedagogically beneficial educational experience that she seeks and would simultaneously deny those benefits to the cadets who have sought and now enjoy them. If the Fourth Circuit correctly concluded that the State was constitutionally obliged to provide an all-female educational program, it follows that the court erred in effectively ordering the coeducation of The Citadel rather than establishment of such an all-female program.

VI. CONCLUSION

For the foregoing reasons, the State of South Carolina and The Citadel respectfully request that this petition for a writ of certiorari to the United States Court of Appeals for the First Circuit be granted and the case be set for plenary review.

Respectfully submitted,

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Dated: August 11, 1995

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SHANNON RICHEY FAULKNER, individually and on behalf of all others similarly situated,
Plaintiff,

v.

JAMES E. JONES, JR., Chairman, Board of Visitors of The Citadel, the Military College of South Carolina; CARROLL A. CAMPBELL, JR., T. EASTON MARCHANT, BARBARA S. NIELSEN, WILLIAM F. PRIOLEAU, JR., WILLIAM E. JENKINSON, III, LEONARD C. FULGHUM, JR., JAMES M. LELAND, JR., JOHN A. McALLISTER, JR., DAVID S. BOYD, JR., JULIAN G. FRASIER, III, JAMES W. BRADIN, LARRY J. FERGUSON, and STEVE D. PEPER, Members of the Board of Visitors of the Citadel, The Military College of South Carolina; WALLACE I. WEST, JR., Director of Admissions and Recruiting at The Citadel, the Military College of South Carolina, CLAUDIUS E. WATTS, III, President of The Citadel, The Military College of South Carolina, in their official capacities.
Defendants.

COMPLAINT

(Filed March 2, 1993)

Civil Action No. 2 93 0488 2

I. Preliminary Statement

1. This is an action for declaratory and injunctive relief under 42 U.S.C. Section 1983 to redress violations of the right to equal protection under the law as guaranteed by the Fourteenth Amendment to the United States Constitution. Plaintiff alleges that defendants engage in unconstitutional sex discrimination in their categorical exclusion of qualified women from The Citadel, The Military College of South Carolina (hereinafter "The Citadel"), a state supported and state operated institution. Plaintiff asserts that she would have been admitted to the Corps of Cadets if she was a male, but that she has been determined ineligible solely on the basis of sex. Plaintiff seeks admission to the Corps of Cadets.

II. Jurisdiction and Venue

2. The Court has jurisdiction pursuant to 28 U.S.C. Section 1343(3) and 28 U.S.C. Section 1331. The Court is authorized to grant declaratory relief and other relief under 28 U.S.C. Sections 2201 and 2202.

3. Venue is properly in this Court pursuant to 28 U.S.C. Section 1391(b).

III. Plaintiff

4. Plaintiff, SHANNON RICHEY FAULKNER, is a resident and domiciliary of Pickins County, State of South Carolina, and a student of the South Carolina Public School system. Plaintiff applied for admission to The Citadel. After being provisionally admitted to the Corps

of Cadets on her merits, The Citadel revoked her acceptance after discovering that Plaintiff was female.

IV. Class Action Allegations

5. Plaintiff FAULKNER asserts claims under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution on her behalf and, pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure, on behalf of all persons similarly situated. Plaintiff represents a class of all women who are denied admission as a result of their sex from the Corps of Cadets. The class meets all requirements of Rule 23(b)(2) in that:

(a) The members of the class are so numerous that joinder of all class members is impracticable;

(b) There are common questions of law and fact, including without limitation whether defendants' policy categorically to exclude all women from the Corps of Cadets violates the right to equal protection under the law;

(c) The claims of the representative plaintiff is typical of the claims of the class, and the representatives will fairly and adequately protect the interests of the class; and,

(d) Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

V. Defendants

6. The Board of Visitors of The Citadel is responsible for the governance and operation of The Citadel and for prescribing the terms upon which students may be admitted to The Citadel. The individual members of the Board of Visitors, who are collectively responsible for the governance and operation of The Citadel, are JAMES E. JONES, JR., Chairman, CARROLL A. CAMPBELL, JR., (Ex-Officio), T. EASTON MARCHANT (Ex-Officio), BARBARA A. NIELSEN (Ex-Officio), WILLIAM F. PRIOLEAU, JR., WILLIAM E. JENKINSON, III, LEONARD C. FULGHUM, JR., JAMES M. LELAND, JR., JOHN A. McALLISTER, JR., DAVID S. BOYD, JR., JULIAN G. FRASIER, III, JAMES W. BRADIN, LARRY J. FERGUSON and STEVE D. PEPER. Composition of the Board of Visitors of The Citadel is determined pursuant to Section 59-121-10, South Carolina Code of Laws, as amended (Lawyers Co-op., 1976).

7. Defendant CLAUDIUS E. WATTS, III is President of The Citadel, and as such is responsible for its overall supervision, management and operation.

8. Defendant WALLACE I. WEST, JR., is Director of Admissions and Recruiting at The Citadel as such is responsible for admitting students into the Corps of Cadets.

9. All individual defendants named herein reside within the State of South Carolina. All are sued in their official capacities. Each defendant has acted under color of law with regard to all matters alleged herein.

VI. Facts

10. The Citadel offers a full-time undergraduate program (the "Day Program") called the "Corps of Cadets". The Citadel admits male students to its Corps of Cadets. The Corps of Cadets is comprised of over 1,800 male undergraduate students residing in four (4) barracks on campus where they are given a liberal arts education in a military environment. All members of the Corps of Cadets are male.

11. Males enrolled in the Corps of Cadets may choose from seventeen baccalaureate majors.

12. Plaintiff applied to The Citadel in January 1993. In applying, she requested for her high school to delete her gender from her transcript. Plaintiff was truthful on her application and never presented herself as a male. Instead, Plaintiff's transcript was gender neutral. The application to The Citadel does not specify gender nor require a picture.

13. On or about January 22, 1993, Plaintiff received a provisional acceptance letter from The Citadel. This letter stated that to be fully accepted she must:

(a) complete all designated academic courses;

(b) provide a final high school transcript verifying her graduation, grade point ratio and class standing;

(c) gain medical approval by completing a medical form;

(d) sign and return the drug testing form.

Plaintiff was prepared to complete the foregoing.

14. On or about February 10, 1993, Defendant WALLACE I. WEST, JR., wrote Plaintiff a letter revoking her provisional acceptance on the grounds that they had discovered she was a female and that The Citadel only admits men to the Corps of Cadets;

15. Plaintiff satisfied all content or merit based criteria for admission to the Corps of Cadets, is fully qualified for admission and, but for her sex, would have been admitted;

16. Solely because Plaintiff is female, The Citadel revoked her acceptance;

17. Had the Plaintiff not submitted a gender neutral transcript, her merits would have not even been reviewed. All former applicants who were female and whose data stated such were summarily rejected by The Citadel solely on the basis of gender.

18. The Citadel is the only military college in the State, is supported by state taxation monies and discriminates on the basis of gender.

VII. Violation of Law

19. Defendants' actions in denying Plaintiff admission to the Corps of Cadets discriminates against the Plaintiff on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. Section 1983.

VIII. Prayer for Relief

WHEREFORE, Plaintiff prays that this Court:

(a) Permanently enjoin the defendants, their officers, agents, employees, successors, assigns, representatives, and all persons in active concert or participation with them from discriminating on the basis of sex in admitting qualified women, to the Corps of Cadets;

(b) Order that Plaintiff's provisional admission be reinstated and that Plaintiff be admitted to the Corps of Cadets;

(c) Grant reasonable attorneys fees, costs and expenses pursuant to 42 U.S.C. Section 1988;

(d) Adopt procedures to insure that other qualified women applicants are admitted to the Corps of Cadets at The Citadel;

(e) Grant such other additional relief as it deems just and proper.

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Greenville, S.C.
March 2, 1993

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SHANNON RICHEY FAULKNER, Individually and on behalf of all others similarly situated

Plaintiff,

and the
UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

JAMES E. JONES, JR., Chairman, Board of Visitors of The Citadel, the Military College of South Carolina, CARROLL A. CAMPBELL, JR., Governor of the State of South Carolina, T. ESTON MARCHANT, Adjutant General of the State of South Carolina, BARBARA S. NIELSEN, Superintendent of Education of the State of South Carolina, WILLIAM F. PRIOLEAU, JR., WILLIAM E. JENKINSON, III, LEONARD C. FULGHUM, JR., JAMES M. LELAND, JR., JOHN A. MCALLISTER, JR., DAVID S. BOYD, JR., JULIAN G. FRASIER, III, JAMES W. BRADIN, LARRY J. FERGUSON, and STEVEN D. PEPER, Members of the Board of Visitors of The Citadel, the Military College of South Carolina; WALLACE I. WEST, JR., Director

Civil Action
No. 2 93 0488 2

(Filed
June 7, 1993)

of Admissions and Recruiting at The Citadel, the Military College of South Carolina, CLAUDIUS E. WATTS, III, President of The Citadel, the Military College of South Carolina, in their official capacities,

Defendants,

and THE STATE OF SOUTH CAROLINA, THE CITADEL, the Military College of South Carolina, and THE BOARD OF VISITORS OF THE CITADEL, the Military College of South Carolina,

Added Defendants.

COMPLAINT-IN-INTERVENTION

The United States of America alleges that:

1. This action, which was commenced on March 2, 1993, seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment to the Constitution on account of sex, is a case of general public importance and has been so certified by the Attorney General of the United States pursuant to Title IX of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000h-2.

2. This complaint-in-intervention is timely.

3. Jurisdiction over the original complaint arises under 42 U.S.C. §1343(3) and §1331. Jurisdiction over this complaint-in-intervention arises additionally under 28 U.S.C. §1345 and 42 U.S.C. §2000h-2.

4. Added defendant the State of South Carolina has created and authorizes operation of, including the expenditure of public funds for, public colleges, one of which is The Citadel.

5. Added defendant The Citadel, The Military College of South Carolina (The Citadel), is a public institution organized and existing under the laws of the State of South Carolina. The Citadel is located in Charleston, South Carolina.

6. Added defendant the Board of Visitors of The Citadel, the Military College of South Carolina, is a body corporate and politic of the State of South Carolina and has responsibility for governing and administering The Citadel.

7. Defendant Carroll A. Campbell is Governor and chief executive officer of the State of South Carolina and an *ex officio* member of the Board of Visitors of The Citadel and is being sued in these capacities. Governor Campbell maintains his offices in Columbia, South Carolina.

8. Defendant Barbara S. Neilsen is the State Superintendent of Education and an *ex officio* member of the Board of Visitors and is sued in these capacities. State Superintendent Neilsen maintains her office in Columbia, South Carolina.

9. Defendant Claudius E. Watts, III is the President of The Citadel and is being sued in this capacity.

10. Defendants James F. Jones, Jr. is the Chairman of the Board of Visitors of The Citadel, and, William F.

Prioleau, Jr., William E. Jenkinson, III, Leonard C. Fulghum, Jr., James M. Leland, Jr., John A. McAllister, Jr., David S. Boyd, Jr., Julian G. Frasier, III, James W. Bradin, Larry J. Ferguson, and Steven D. Peper are members of the Board of Visitors of The Citadel, respectively, and are being sued in this capacity.

11. Defendant Major General T. Eston Marchant, Adjutant General of South Carolina, is an *ex officio* member of the Board of Visitors of The Citadel and is being sued in this capacity.

12. Defendant Wallace I. West, Jr., is Director of Admissions and Recruiting at The Citadel and is being sued in this capacity.

13. Defendants named in paragraphs 4-12 are responsible for the operation of The Citadel.

14. Defendants named in paragraphs 4-12 reside within the State of South Carolina.

15. Defendants have engaged in discrimination on the basis of sex by maintaining a policy of restricting admission to the four-year daytime undergraduate degree program, the Corps of Cadets of The Citadel, to males only, and by refusing to consider qualified females for admission to that program.

16. This discrimination on the basis of sex constitutes a denial of equal protection under the Constitution and laws of the United States.

WHEREFORE, the United States prays that this Court:

1. Declare that the defendants have unlawfully discriminated on the basis of sex by refusing to admit or consider the admission of qualified females to The Citadel in violation of the Constitution and laws of the United States;

2. Permanently enjoin the defendants, their officers, agents, employees, successors, assigns, and all persons in active concert or participation with them from all unlawful discrimination on the basis of sex in the operation of The Citadel; and

3. Order defendants to formulate, adopt, and fully and timely implement a plan to remedy fully their discriminatory policies and practices and to comply with the requirements of federal law including the Fourteenth Amendment to the Constitution of the United States.

The United States further requests that this Court grant such other additional relief as it deems just and proper.

/s/ Janet Reno
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APPENDIX C

Shannon Richey FAULKNER, individually and on behalf of all others similarly situated; United States of America, Plaintiffs/Appellees,

v.

James E. JONES, Jr., Chairman, Board of Visitors of The Citadel, the Military College of South Carolina; Carroll A. Campbell, Jr., Member of the Board of Visitors of The Citadel, the Military College of South Carolina; T. Easton Marchant, Member of the Board of Visitors of The Citadel, the Military College of South Carolina; Barbara S. Nielsen, Member of the Board of Visitors of The Citadel, the Military College of South Carolina; William F. Prioleau, Jr., Member of the Board of Visitors of The Citadel, the Military College of South Carolina; William E. Jenkinson, III, Member of the Board of Visitors of The Citadel, the Military College of South Carolina; Leonard C. Fulghum, Jr., Member of the Board of Visitors of The Citadel, the Military College of South Carolina; James M. Leland, Jr., Member of the Board of Visitors of The Citadel, the Military College of South Carolina; John A. McAllister, Jr., Member of the Board of Visitors of The Citadel, the Military College of South Carolina; David S. Boyd, Jr., Member of the Board of Visitors of The Citadel, the Military College of South Carolina; Julian G. Frasier, III, Member of the Board of Visitors of The Citadel, the Military College of South Carolina; Larry J. Ferguson, Member of the Board of Visitors of The Citadel, the Military College of South Carolina; Steve D. Peper, Member of the Board of Visitors of The Citadel, the Military College of South Carolina; Wallace I. West, Jr., Director of Admissions and

Recruiting at The Citadel, the Military College of South Carolina; Claudius E. Watts, III, President of The Citadel, the Military College of South Carolina; State of South Carolina; The Citadel, the Military College of South Carolina; the Board of Visitors of The Citadel, the Military College of South Carolina, Defendants Appellants.

No. 93-2030 (CA-93-488-2).

United States Court of Appeals,
Fourth Circuit.

Jan. 11, 1994.

PRIOR REPORT: 10 F.3d 226

ORDER

Appellants have filed a motion to stay the mandate pending application to the Supreme Court of the United States for a writ of certiorari and appellee filed a response to the motion.

The Court denies the motion.

Entered at the direction of Circuit Judge NIEMEYER, with the concurrence of Circuit Judge K.K. HALL.

Circuit Judge HAMILTON dissents from the denial of the motion and has filed a separate written dissent.

HAMILTON, Circuit Judge, dissenting:

Before issuing a mandate which compels The Citadel to jettison 151 years of distinguished educational tradition, I believe we should afford the Supreme Court an opportunity to consider two compelling questions of national importance which have not yet been addressed.

I, therefore, dissent from the majority's decision to deny the motion for stay of mandate pending application for writ of certiorari.

First, the preliminary injunction affirmed by the majority invokes issues of comity and federalism. Before The Citadel is required to transform itself, I believe the Supreme Court should be afforded the opportunity to consider whether a federal court may properly impose a remedy for a constitutional violation without first providing the state the right to devise and implement its own remedy. In my view, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), and its progeny require a federal court to refrain from imposing a particular remedy on a state, even on a preliminary basis, *before* the state has had the opportunity to fashion a remedy from a variety of permissible alternatives.

Second, the Supreme Court should also be afforded an opportunity to consider a novel issue under the Equal Protection Clause. Specifically, The Citadel claims that, under *Mississippi University for Women v. Hogan*, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982), and its progeny, including our decision in *VMI*, 976 F.2d 890 (4th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2431, 124 L.Ed.2d 651 (1993), establishing a lack of demand by women for a Citadel-type education would justify South Carolina's decision to provide such educational opportunities only to men. Faulkner rejects this argument, asserting that a lack of demand can never justify a state's decision to deprive a lone woman of the same educational opportunities which the state provides to men. Even the majority could not reach a consensus on this

question. *Compare Faulkner v. Jones*, 10 F.3d 226 (4th Cir.1993) ("[A]ny analysis of the nature of a separate facility [for women] . . . must take into account . . . the demand (both in terms of quality and quantity. . . .), *with Id.* at 231 (Hall, J., concurring) ("I question whether, under the Equal Protection Clause, a state can ever have a sufficiently important interest to justify expending funds to maintain an institution that not only practices inequality, but celebrates it."). Before the State of South Carolina undertakes the costly and timely discovery to establish such a lack of demand in a trial on the merits, I believe the Supreme Court should first be afforded the opportunity to rule, as a matter of law, whether such lack of demand would, under the intermediate scrutiny applicable to gender-based discrimination claims, justify a state's failure to provide equal educational opportunities to both genders.

It could be argued that, if the Supreme Court wishes to review these important constitutional questions, it could issue its own stay. Such an argument, in my opinion, abrogates the responsibility of this court by ignoring the appropriate inquiry which we are bound to undertake when deciding whether to grant such a stay. Specifically, Fourth Circuit I.O.P. 41.2 allows this court to grant such a stay if the matter raises a "substantial question" or "set[s] forth good or probable cause for a stay." Unquestionably, the two questions previously discussed qualify as "substantial." In addition, the failure of the majority to reach a consensus on the second question clearly provides "good or probable cause for a stay." Such undefined parameters of our Constitution should be explored before, rather than after, we compel The Citadel to transform itself. *See,*

e.g., Virginia Military Institute v. United States, ___ U.S. ___, 113 S.Ct. 2431, 124 L.Ed.2d 651 (1993), where Justice Scalia opined:

> Whether it is constitutional for a State to have a men-only military school is an issue that should receive the attention of this Court before, rather than after, a national institution as venerable as the Virginia Military Institute is compelled to transform itself.

Finally, I note that we afforded VMI a similar stay on *two separate occasions*. I see no reason why The Citadel should not be afforded the same privilege, especially since the mandate in this case "compels [The Citadel] to transform itself," while the mandate in *VMI* did not disrupt that school's on-going educational program. *Virginia Military Institute*, ___ U.S. at ___, 113 S.Ct. at 2431 (1993). I realize that, unlike *VMI*, this case contains "time pressure" and "the absence of [other] opportunity" for Faulkner, and I am certainly sympathetic to a young woman's desire to attend the college of her choice. However, if the Supreme Court denies certiorari, then granting The Citadel's motion will have delayed Faulkner's attendance at The Citadel by only one semester. Surely, Faulkner could endure a one semester delay while the Supreme Court decides whether to address the nationally important and unresolved constitutional issues presented by this case.

In summary, this case involves at least two significant constitutional questions which the Supreme Court has not yet addressed. Even the majority failed to reach a consensus on the latter issue. In light of the important and unresolved constitutional questions inherent in this

matter, I believe this court should stay its mandate pending The Citadel's application for writ of certiorari. I, therefore, dissent from the majority's denial of the motion for such a stay.

Supreme Court, U.S.
FILED
SEP 7 1995

No. 95-258

In the Supreme Court of the United States

OCTOBER TERM, 1995

JAMES E. JONES, JR., ET AL., PETITIONERS

v.

SHANNON RICHEY FAULKNER
AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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20 pp

QUESTIONS PRESENTED

1. Whether respondents' objections to the constitutional adequacy of petitioners' proposed remedy for petitioners' violation of the Equal Protection Clause divested the lower courts of jurisdiction to authorize a remedy of the type petitioners proposed.

2. Whether petitioners are relieved of any obligation to remedy the unconstitutional sex-based exclusion of women from The Citadel because of an alleged lack of demand by women for a parallel all-female program when the lower courts found that there is no such lack of demand.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-258

JAMES E. JONES, JR., ET AL., PETITIONERS

v.

SHANNON RICHEY FAULKNER
AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Faulkner App. 1a-32a) is reported at 51 F.3d 440.[1] The opinion of the district court (Faulkner App. 33a-66a) is reported at 858 F. Supp. 552. An earlier opinion of the court of appeals (Faulkner App. 70a-100a) granting respondent Faulkner's motion for a preliminary injunction is

[1] References to "Faulkner App. __" are to page numbers in the appendix of Shannon Richey Faulkner's petition for a writ of certiorari, filed on July 10, 1995. *Faulkner* v. *Jones*, No. 95-31.

reported at 10 F.3d 226. The order of the district court granting Faulkner's motion for a preliminary injunction (Faulkner App. 69a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1995. On June 30, 1995, the Chief Justice granted petitioners an extension of time within which to file a petition for a writ of certiorari to and including August 11, 1995. The petition for a writ of certiorari was filed on August 11, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Citadel has had a males-only admissions policy since its founding in 1842. It is one of 12 public colleges and universities in South Carolina offering four-year degree programs, and it is the only institution in the State that offers a military-style educational program. Members of The Citadel Corps of Cadets[2] are subject to military discipline at all times, and are enrolled in programs of study that qualify graduates for commissions in the active or reserve armed forces. Faulkner App. 37a, 38a, 71a.

In March, 1993, Shannon Richey Faulkner filed suit challenging The Citadel's males-only admissions policy. Faulkner had previously been accepted for admission to The Citadel and its Corps of Cadets, but that acceptance was revoked when the school learned that she was female. Faulkner sought permanent relief ordering her admission and prohibiting petitioners from continuing to exclude women from The

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[2] The Corps of Cadets is the military-style co-curricular component that is the central feature of The Citadel's educational program.

Citadel. On May 28, 1993, Faulkner filed a motion for class certification, which remains pending. In June, 1993, the United States intervened as a plaintiff pursuant to 42 U.S.C. 2000c-6. Faulkner App. 2a, 34a-37a, 71a-72a.

2. In *United States* v. *Commonwealth of Virginia*, 976 F.2d 890 (4th Cir. 1992), cert. denied, 113 S. Ct. 2431 (1993) (*VMI I*)—a case preceding this one and closely similar to it—the court of appeals considered an equal protection challenge to the Commonwealth of Virginia's exclusion of women from the Virginia Military Institute (VMI). The court held that the defendants had failed to justify offering the unique benefits of a VMI-type education to men and not to women, and that VMI's males-only admissions policy thus violated the Equal Protection Clause. *Id.* at 892. The court of appeals "remand[ed] the case to the district court to give to the Commonwealth the responsibility to select a course it chooses, so long as the guarantees of the Fourteenth Amendment are satisfied." *Id.* at 900. The court stated that "the Commonwealth might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution. While it is not ours to determine, there might be other more creative options or combinations." *Ibid.*

On remand, the *VMI* defendants proposed a remedial plan establishing a separate program for women at Mary Baldwin College, called the Virginia Women's Institute for Leadership (VWIL). VWIL would not use VMI's adversative method or pervasive military life; a cooperative confidence-building method

would be employed at VWIL, and military training would be limited to the pre-existing ROTC program. The district court upheld the remedial plan, and the court of appeals affirmed. *United States* v. *Commonwealth of Virginia*, 44 F.3d 1229 (4th Cir. 1995) (*VMI II*), petition for cert. pending, No. 94-1941. Adopting a new, three-part "special intermediate scrutiny test," the court held that Virginia could remedy its constitutional violation by offering women a separate single-gender educational program "substantively comparable" to the VMI program. *Id.* at 1237. The court concluded that VMI and VWIL meet that test because the "missions are similar and the goals are the same" and "[b]oth seek to teach discipline and prepare students for leadership." *Id.* at 1240.[3]

3. Meanwhile, following a trial on the merits, and in light of the court of appeals' decision in *VMI I*, the district court on July 22, 1994, held that The Citadel's males-only admissions policy violates the Equal Protection Clause. Faulkner App. 33a-66a.[4]

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[3] On May 26, 1995, the United States filed a petition for a writ of certiorari challenging the constitutional adequacy of the remedy approved in *VMI II*. *United States* v. *Commonwealth of Virginia*, No. 94-1941. The *VMI* defendants filed a conditional cross-petition seeking review of the court of appeals' initial liability determination in the event the Court grants the United States' petition. *Commonwealth of Virginia* v. *United States*, No. 94-2107. The petition and cross-petition are pending.

[4] The district court had, on August 17, 1993, granted Faulkner's motion for a preliminary injunction permitting her to attend The Citadel as a day student, Faulkner App. 69a, and the court of appeals affirmed that order on November 17, 1993, *id.* at 70a-100a. She continued to be excluded, however, from the Corps of Cadets.

The court ordered Faulkner's immediate admission to The Citadel's Corps of Cadets. *Id.* at 62a-63a. With respect to other qualified women who might desire to attend The Citadel and join the Corps, the court gave petitioners until the start of the 1995-1996 school year to formulate and implement a remedial plan conforming with the Equal Protection Clause. *Id.* at 65a.

4. On April 13, 1995, the court of appeals affirmed the judgment of the district court that The Citadel's males-only admissions policy violates the Equal Protection Clause. Faulkner App. 1a-32a.[5] The court rejected petitioners' argument that the policy of excluding women from The Citadel is gender-neutral. *Id.* at 4a-5a. The court also affirmed the district court's factual findings that there is no absence of demand among women for a single-sex program parallel to The Citadel, and thus rejected petitioners' contention that their failure to offer such a program to women is justified by an absence of demand for it. *Id.* at 8a-9a.[6] The court noted that petitioners conceded at oral argument that there was "no data before [the] court to support a finding of an absence of demand among women at the present time for single-gender education of any type." *Id.* at 9a.

The court of appeals' April 13, 1995, opinion also modified the district court's remedial order. Faulk-

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[5] Judge Hall wrote a concurring opinion. Faulkner App. 18a-20a. Judge Hamilton dissented. *Id.* at 20a-32a.

[6] Faulkner App. 8a (rejecting petitioners' contention that the current absence of "a Citadel for women" results from an absence of adequate demand for such a program because petitioners "ha[d] not offered evidence to establish that absence of demand").

ner App. 18a. Although the court noted that petitioners had already had substantial time to devise a remedy and had failed to do so, it held that the district court should give them "reasonable" additional time beyond the start of the 1995-1996 school year to put their general remedial plan in place. *Id.* at 14a-15a. The court emphasized that the State should have the opportunity in the first instance to devise a remedial plan to bring its higher education system into compliance with the Equal Protection Clause, and, following its *VMI* decisions, identified some of the remedial alternatives it viewed as acceptable:

> If [South Carolina] elects to maintain single-gender education at The Citadel, then it must provide parallel programs for men and women that are substantively comparable. *See VMI II.* Alternatively, the state may adopt a coeducational policy for The Citadel, or it may withdraw state support from The Citadel and permit that institution to continue as a private institution.

Id. at 14a. The court of appeals also modified the district court's order requiring that petitioners immediately admit Faulkner to the Corps, instead ordering her admission only "if the state is unable to accomplish an acceptable alternative plan by August 1995." *Id.* at 18a.[7]

5. On June 5, 1995, petitioners filed a remedial plan in district court in which they proposed the creation

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[7] On July 10, 1995, Faulkner filed a petition for a writ of certiorari in this Court seeking review of that part of the court of appeals' decision permitting petitioners, in accordance with *VMI II*, to remedy their constitutional violation by creating a separate school for women. *Faulkner* v. *Jones*, No. 95-31. That petition is pending.

of a "parallel" program exclusively for women to be called the South Carolina Institute of Leadership for Women (SCIL) at Converse College, a private women's college in Spartanburg, South Carolina. *Faulkner* v. *Jones*, No. 2:93-488-2 (D.S.C. July 24, 1995), slip op. 3.

Respondents requested discovery regarding Converse College and the SCIL plan. On July 24, 1995, the district court held a hearing at which it found that petitioners had deliberately withheld discovery information, had failed to respond properly to discovery requests in violation of the court's rules, and had otherwise slowed the discovery process. *Faulkner* v. *Jones*, *supra*. The court concluded that petitioners' conduct made timely consideration of their remedial proposal impossible, and that admission of Faulkner to the Corps was the only effective remedial alternative for her.

6. Petitioners unsuccessfully applied to the court of appeals, and then to this Court, for a stay of Faulkner's admission to the Corps of Cadets pending their filing of the present petition for a writ of certiorari. They filed the petition on August 11, 1995.

7. Faulkner joined The Citadel Corps of Cadets when The Citadel's 1995-1996 school year began on August 12, 1995. On August 18, 1995, however, she withdrew from The Citadel and the Corps.

8. The district court has set an October 15, 1995, deadline for discovery regarding petitioners' proposed remedy, and a November 6, 1995, date to begin the remedy trial. *Faulkner* v. *Jones*, No. 2:93-488-2 (D.S.C. July 24, 1995), slip op. 12. By motion dated August 31, 1995, Nancy Mellette, a high school senior and resident of South Carolina who wishes to attend The Citadel, moved to intervene as a plaintiff in

this action, and to renew Faulkner's motion for class certification.

ARGUMENT

Petitioners seek certiorari on two grounds, neither of which has merit or presents any issue worthy of this Court's review.[8]

1. Petitioners assert (Pet. 15-22) that the lower courts "exceed[ed] their jurisdiction in this case by reaching the issue of whether the absence of an all-female military program like The Citadel is constitutionally justified." Pet. 13. They contend that, because respondents sought admission of women to The Citadel, and not the creation of a separate school exclusively for women, "there is no 'case or controversy' * * * concerning the State's failure

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[8] The insubstantial nature of petitioners' arguments are underscored by the incorrect premise on which they rest. Petitioners mischaracterize the court of appeals' decision as having held that the males-only admissions policies of VMI and The Citadel are *constitutional*. Petitioners assert, for example, that the court of appeals "concluded that The Citadel's males-only admissions policy satisfies the equal protection standard established by this Court in [*Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982)]." Pet. 13. See also Pet. 4 (describing *VMI I* as having concluded "that VMI's males-only admission policy is constitutionally justified"); *id.* at 10-11 (omitting mention of liability determination in describing *Faulkner II*); *id.* at 17 (referring to *VMI I* as "concluding that VMI's males-only admission policy was constitutionally justified under the equal protection standard established in *Hogan*"). The court of appeals held, however, that "South Carolina and The Citadel are *in violation of the Equal Protection Clause*." Faulkner App. 9a (emphasis added). If petitioners' assertion were true, there would have been no remedial proceedings in either case.

to establish an all-female military program like The Citadel." Pet. 20.[9]

Petitioners have not presented a jurisdictional issue. The fact that the United States and Faulkner have both consistently argued for coeducation at The Citadel as the only constitutionally adequate remedy in this case has no effect on their standing or on any other aspect of the lower courts' jurisdiction over this case. Indeed, petitioners concede (Pet. 20) that the United States has standing to challenge The Citadel's policy of excluding women.[10] It is undisputed that qualified women who wish to attend The Citadel are precluded from doing so solely because they are women. Such sex-based exclusion constitutes an "actual or imminent" injury, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992), that is obviously "fairly traceable" to The Citadel's unconstitutional policy, *Allen* v. *Wright*, 468 U.S. 737, 751 (1984).[11] See also 42 U.S.C. 2000c-6(a) (providing that federal district courts "shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section").

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[9] Petitioners acknowledge (Pet. 14 n.4) that they have never raised this argument in the lower courts, either in their stay motions recently filed (on July 28 and August 9, 1995) in the court of appeals, or in the pending remedial proceedings in the district court. If there were a true jurisdictional impediment to further proceedings in this case, bringing it to the attention of the lower courts could obviate any need for review by this Court.

[10] Petitioners also concede that Faulkner had standing, but any issue with respect to her standing is now moot in view of her withdrawal from The Citadel.

[11] In none of the cases upon which petitioners rely (Pet. 18-21) was such an injury shown.

Petitioners seek to turn respondents' objection to petitioners' choice of remedy into a jurisdictional defect, and thereby to avoid any obligation to remedy an established equal protection violation. Having found that petitioners violated women's right to equal protection of the laws (Faulkner App. 2a), the court of appeals gave petitioners the opportunity to propose a remedy that "conforms with the Equal Protection Clause." *Id.* at 18a. The court identified three remedies that, in its view, would do so: The Citadel could (1) establish parallel single-sex programs for men and women that are "substantively comparable"; (2) adopt a coeducation policy at The Citadel; or (3) withdraw state support for The Citadel and permit the college to continue as a private institution. *Id.* at 14a. On remand in the district court, petitioners chose the first option. Although the United States believes that no new, separate program could be equal to The Citadel and that the court of appeals thus erred in giving petitioners that remedial option, the court operated on the premise that petitioners could create an all-female school that would provide for women what The Citadel provides for men. The fact that the program is not the remedy that respondents sought does not deprive the court of jurisdiction to remedy the constitutional violation. See *Heckler* v. *Mathews*, 465 U.S. 728, 739-740 & n.8 (1984).[12] Indeed, it is a

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[12] The male plaintiff in *Mathews* sought spousal benefits under the Social Security Act on equal terms with women who obtained such benefits, and the Court held that he had standing even though the only available relief was to terminate the disputed benefits to women rather than extend them to men. 465 U.S. at 737. The Court recognized that, under the Equal Protection Clause, the fact that plaintiffs' situation may be equalized either by granting them the benefits enjoyed by the

familiar principle that judicial remedies are to be devised in light of both parties' contentions and the record in the case. See, *e.g.*, 28 U.S.C. 2106 (authorizing appellate courts to direct on remand "the entry of such appropriate judgment, decree, or order * * * as may be just under the circumstances").

In any event, even if petitioners were correct that the lower courts somehow lacked jurisdiction to hold that petitioners might remedy the constitutional violation by establishing a college for women that is "substantively comparable" to The Citadel, that defect would not absolve petitioners of responsibility to remedy the violation, but would simply remove that remedial option. Specifically, petitioners do not—and certainly cannot—contend that the lower courts lack jurisdiction to require coeducation at The Citadel, and the court of appeals has held that coeducation is an acceptable remedy. If the Court were to accept petitioners' "jurisdictional" argument, the consequence of that acceptance would be that petitioners were required to institute coeducation at The Citadel —precisely the result that petitioners seek to avoid.

2. Petitioners also assert (Pet 22-29) that this Court should review whether the absence of demand for an all-female Citadel-type educational program "constitutes a complete defense to any claim that the absence of such a program in South Carolina violates the Equal Protection Clause." Pet. 26. That issue is not worthy of review by this Court because the argument is completely fact-based, and petitioners

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preferred class (as they request) *or* by withdrawing those benefits from everyone (a remedy that plaintiffs ordinarily do not request)—or by equalizing the treatment of the two classes in some other way—does not affect plaintiffs' standing to litigate.

failed to prove any factual ground for it. Moreover, it is well established that, as a matter of law, the State's obligation to provide constitutionally equal educational opportunity for each woman who seeks it is not conditioned on how many other women seek the same opportunity.

Petitioners argued in the district court and the court of appeals that "single-sex educational opportunities are not available to women in South Carolina's public system of higher education because there is insufficient demand for them." Faulkner App. 6a (quoting district court, see *id.* at 54a). Both lower courts rejected that argument. The district court found that "no survey has been conducted to determine * * * how many women would be interested in pursuing a public single-sex education" and that "[t]he interest of South Carolina women in attending a Mary Baldwin-type program [such as that approved in *VMI II*] is unknown." *Id.* at 46a. Similarly, the court of appeals held that petitioners simply "failed to present evidence supporting an absence of demand." *Id.* at 8a. Indeed, petitioners conceded at oral argument in the court of appeals that "there really is no data before this court to support a finding of an absence of demand among women at the present time for single-gender education *of any type*." *Id.* at 9a (emphasis added). Thus, petitioners' demand argument is utterly lacking in factual foundation, *id.* at 8a-9a, and thus clearly does not warrant review by this Court.[13]

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[13] Petitioners lack-of-demand argument is further undermined by the fact that 22 women are participating in the all-female South Carolina Institute of Leadership for Women (SCIL) under review in the district court. Petitioners suggest

Even if absence of demand had been demonstrated, however, it could not justify the denial of any individual woman's entitlement to a remedy for the violation of her right to equal protection. Women cannot be excluded from a program that they wish to attend and for which they qualify, and be relegated instead to a substantially different program that they do not want and that does not meet their needs, solely because most women would not be inconvenienced by that result. At a time when racial segregation was constitutionally permissible under this Court's decisions, the Court held that a black person could not be denied admission to a white law school on the ground that not enough blacks were interested in a legal education to justify the establishment of a black law school as well. *Missouri. ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938). The equal protection right of the black law school applicant was "a personal one,"[14]

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that demand for such a program is irrelevant because "the inquiry relating to demand * * * is defined and delimited by the equal protection claim advanced by [respondents] in this case," Pet. 22, and respondents have never sought as a remedy the establishment of a SCIL-type program. Petitioners thus contend that "the only demand inquiry that may be relevant * * * is demand for an all-female military program that mirrors The Citadel in its mission, its goals, and its educational philosophies and methodologies." *Ibid.* As noted above, however, the court of appeals found no lack of demand for single-sex education "of any type." Faulkner App. 9a.

[14] See also *Adarand Constructors, Inc.* v. *Pena*, 115 S. Ct. 2097, 2112-2113 (1995); *J.E.B.* v. *Alabama*, 114 S. Ct. 1419, 1423-1434 (1994) (Kennedy, J., concurring in the judgment); *Regents of Univ. of California* v. *Bakke*, 438 U.S. 265, 289 (1978) (opinion of Powell, J.).

To be sure, additional considerations may be brought to bear in devising remedies for discrimination. "The unhappy

such that he was entitled to be furnished an educational program equal to that provided to whites "whether or not other negroes sought the same opportunity." *Id.* at 351. And as early as 1914 the Court held that the failure to offer black travelers luxury railroad accommodations that whites enjoyed could not be justified on the ground that too few black travelers could afford such accommodations. The rights of black travelers who could afford the accommodation were equal to those of whites who could afford them. *McCabe* v. *Atchison T. & S.F. Ry.*, 235 U.S. 151. The Equal Protection Clause affords women at least the level of individual protection against sex discrimination as *Gaines* and *McCabe* held was due to blacks under a regime of officially sanctioned racial segregation.[15]

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persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand Constructors, Inc.*, 115 S. Ct. at 2117. The same may be said of remedies for discrimination based on sex, but petitioners do not contend, nor could they, that The Citadel's males-only admissions policy is remedial.

[15] Petitioners seek to distinguish *Gaines* and *McCabe* on the ground that those cases dealt with discrimination on the basis of race, not sex, and "[s]eparation of the races does not confer any benefit," while "[s]eparation of the sexes in single-gender education * * * has been proven to be pedagogically beneficial." Pet. 27. Those cases, however, were decided at a time, before *Brown* v. *Board of Education*, 347 U.S. 483 (1954), when the law reflected a belief that separation of the races *was* beneficial and constitutional. Oddly, petitioners seek to further distinguish those precedents on the ground that, because they were decided before *Brown*, they are "justly discredited," Pet.

3. The petition is also premature. Both questions that petitioners have presented relate to only one of the various remedial options the court of appeals suggested could remedy the violation in this case, and petitioners' implementation of that option has not yet been reviewed or approved by the lower courts.[16] On July 24, 1995, the district court set an October 15, 1995, cut-off date for discovery regarding the Converse College remedial proposal and ordered that a trial on remedy begin on November 6, 1995. It remains uncertain whether the district court or the court of appeals will find petitioners' separate program to be constitutionally adequate even under the lenient standard the court of appeals announced in *VII*. If petitioners' preferred remedy does not pass muster, petitioners, who do not otherwise challenge the court of appeals' liability decision, will have to adopt an alternative remedy, such as a sex-neutral admissions policy at The Citadel. Adoption of that remedy would obviate any need to address the ques-

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27, but the discredit those cases suffer is that they provided too little in the way of remedy, not that they provided too much.

[16] Although petitioners contend that lack of demand for single-sex education for women could be a complete defense to liability, *e.g.*, Pet. 26, they have never even asserted that there is any absence of demand among women for a coeducational Citadel. If only men desire single-sex education, and the type of education offered them cannot otherwise be made available to women, women must be admitted to the men's school. A desire to preserve The Citadel as a single-sex college for men cannot outweigh women's right to equal educational opportunity. *Hogan*, 458 U.S. at 731 n.17.

tions petitioners seek to raise here. Review of those questions therefore would be premature at this time.[17]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1995

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[17] Petitioners suggest (Pet. 12) that the issues they now raise are worthy of review because Faulkner in this case and the United States in *VMI* have filed petitions for writs of certiorari. We believe that the question raised in Faulkner's petition is unripe because the lower courts have not yet reviewed and approved a remedy. See Memorandum for the United States in Opposition (No. 95-31). The *VMI* case is in a different posture. The lower courts have already reviewed the VWIL program at Mary Baldwin College and held that it is an adequate and constitutional remedy. With remedial proceedings in the lower courts completed, there is no lack of ripeness in that case. Because the judgment approving VWIL squarely conflicts with this Court's basic equal protection precedents, it calls for review—as we explain in our petition in that case (No. 94-1941).

Supreme Court, U.S.
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No. 95-258

In The

Supreme Court of the United States

October Term, 1995

JAMES E. JONES, JR., *et al.*,

Petitioners,

v.

SHANNON RICHEY FAULKNER,

Respondent,

and the

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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OTHER

Transcript of Oral Argument held Jan. 30, 1995 in *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995) 7, 8

1. As a threshold matter, we note that Shannon Richey Faulkner[1] has filed an opposition ("Faulkner Opp.") to our petition even though she no longer has any conceivable legally protectable interest in this matter. On August 18, Faulkner voluntarily withdrew from The Citadel, and made clear that she no longer wishes to pursue a Citadel education. When Faulkner withdrew from The Citadel, her claims became moot. The United States agrees that "any issue with respect to [Faulkner's] standing [to challenge The Citadel's males-only admission policy] is now moot in view of her withdrawal from The Citadel," Brief for the United States in Opposition ("U.S. Opp.") at 9 n.10, and even Faulkner does not contend otherwise in her brief in opposition. In light of these events, we have today filed a suggestion of mootness requesting that Faulkner's own petition for certiorari in this case, No. 95-31, be denied as moot. Faulkner's brief in opposition, likewise, should be disregarded.

2. The bulk of Faulkner's and the United States' arguments in opposition to our petition for certiorari flow from their mischaracterization of the court of appeals' decision. They claim that we have misrepresented the Fourth Circuit's decision by describing it as (1) upholding The Citadel's males-only admission policy as substantially related to an important governmental purpose, but (2) concluding that South Carolina violated the Equal Protection Clause in offering this type of single-gender educational program only to men. U.S. Opp. at 8 n.8; Faulkner Opp. at 10-11, 13. Our description is a true and faithful reading of the court's holding, as the words of the court of appeals itself make clear.

In *Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993) (*Faulkner I*) (appended to Faulkner's Petition for Writ of Certiorari, filed July 10, 1995 (No. 95-31) at 70a-100a), the Fourth Circuit described its decision in *United States v. Virginia*, 976 F.2d 890 (4th Cir. 1992) (*VMI I*), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2431 (1993), as follows:

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[1] Because Faulkner has filed her own petition for certiorari, we refer to Faulkner and the United States collectively as "plaintiffs" rather than "respondents." For the same reason, we refer collectively to The Citadel, the Military College of South Carolina, and the State of South Carolina as "defendants."

> With respect to the educational program, we observed that scientific studies offered into evidence supported the conclusion that single-sex education is pedagogically justifiable both for males and females. . . . Thus, with respect to both VMI's military and educational aspects, we held that a single-gender policy was justified by an important state purpose and that the state could appropriately offer a single-gender military education.
>
> While providing a single-gender military education was held to constitute an appropriately important state purpose, we could find no state policy justifying Virginia's decision to offer this unique type of education only to men.

Faulkner I, 10 F.3d at 231-32 (Faulkner Pet. 76a-77a). The court of appeals added: "[W]e can perceive no reason why our holding in *VMI* would not apply in this case." *Id.* at 232 (Faulkner Pet. 78a).

In *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995) (*Faulkner II*), the Fourth Circuit described its binding precedents in *VMI I* and *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995) (*VMI II*) as follows:

> In [*VMI I*] . . . , we held that Virginia's maintenance of a male-only admission policy at Virginia Military Institute (VMI) without the provision of a comparable opportunity for women was not justified by a state policy of providing diversity in education, and we therefore concluded that Virginia was violating the Equal Protection Clause. . . .
>
> In *VMI II*, . . . we held that Virginia's plan of providing single-gender education is not a pernicious state objective. On the contrary, because the state presented sufficient data to support the proposition that a sexually-neutral environment yields concrete educational benefits, we concluded that Virginia could opt for single-gender education as a legitimate and important part of its overall objective of providing higher education to its citizens. We noted, however, that when providing single-gender education to one gender, Virginia could not,

> without adequate justification, deny a substantively comparable benefit to the other gender. . . .
>
> The principles stated in *VMI I* and *VMI II* apply to this case.

Faulkner II, 51 F.3d at 443-44 (Faulkner Pet. 3a-4a). Again, the courts below, as well as the parties, have proceeded in this case on the assumption that The Citadel's males-only admission policy, no less than VMI's identical policy, is substantially related to an important governmental purpose. The only issue tried in the district court and reviewed by the court of appeals in this case was the entirely distinct question, injected into the proceedings by the court of appeals, whether the absence in South Carolina of an all-female military program like The Citadel is constitutionally justified by the absence of any demand for it.

For similar reasons, there is simply no merit to Faulkner's claim that the findings affirmed by the court of appeals with respect to VMI's single-sex adversative educational program do not apply as well to The Citadel's virtually identical educational program. Faulkner Opp. at 11-12. As the United States has itself recognized, "[w]ith regard to 'the issue of whether single-sex education has pedagogical value,' . . . the records in the [*VMI* and *Faulkner*] cases are the same. . . . " Memorandum for the United States in Opposition at 8 n.5, *Faulkner v. Jones* (No. 95-31) (citation omitted). In *Faulkner I*, the court of appeals noted that the circumstances of this case are "strikingly similar to those before [the Court] in the *VMI* case," 10 F.3d at 231 (Faulkner Pet. 75a), and determined that, "we can perceive no reason why our holding in *VMI* would not apply in this case." *Id.* at 232 (Faulkner Pet. 78a). The district court, on remand, noted that VMI was also a males-only military institute "whose primary mission and educational methods are almost identical to The Citadel's" and that the United States' suit against VMI "raised the identical issues presented in the instant litigation." *Faulkner v. Jones*, 858 F. Supp. 552, 554 (D.S.C. 1994) (Faulkner Pet. 34a). In light of these facts, the district court "saw no reason to retry all of the issues addressed in *VMI*. Instead, it chose to try only justification, the only issue that the defendants claim separates them from VMI. . . . " *Id.* at 555 (Faulkner Pet. 36a). Finally, as the district court noted, even plaintiffs accepted the *VMI* holdings "for purposes of their motion

for summary judgment." *Id.* at 555 n.5 (Faulkner Pet. 36a). In *Faulkner II*, the court of appeals observed that the *VMI* holdings "fairly must be construed to apply also to The Citadel," 51 F.3d at 447 (Faulkner Pet. 11a), and reiterated its conclusion in *Faulkner I* that there was no perceptible reason "why our holding in [*VMI*] would not apply in this case." *Id.* at 448 (Faulkner Pet. 13a) (quoting *Faulkner I*, 10 F.3d at 232).

3. Plaintiffs' mischaracterization of the decisions below also infects their response to our argument that the courts below lacked jurisdiction to reach the constitutional justification for the absence in South Carolina of an all-female military program like The Citadel. In our petition we demonstrated that neither Faulkner nor the United States has challenged South Carolina's failure to provide an all-female educational program like The Citadel's. To the contrary, both plaintiffs have alleged only that The Citadel's exclusion of qualified females from its Corps of Cadets violates the Equal Protection Clause. The court of appeals, having concluded that The Citadel's males-only admission policy satisfies the equal protection standard established by this Court in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), fully resolved the only claim placed before it. The courts below exceeded their jurisdiction under Article III when they considered and decided the entirely distinct question whether South Carolina is constitutionally obliged, in light of The Citadel's males-only admission policy, to establish an all-female military program like The Citadel.[2] *See* Pet. at 3-4, 15-21.

Significantly, both the United States and Faulkner concede that they have no interest in the establishment of an all-female military institution like The Citadel. *See* U.S. Opp. at 9-10; Faulkner Opp. at 15. But they seek to characterize the question of

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[2] Faulkner argues that the issue regarding the absence of an "all-female Citadel" was not injected into this case by the courts below, *sua sponte*, but rather by The Citadel itself, when it offered the lack of demand for such an institution as its "justification" for not providing it. Faulkner Opp. at 13-14. Faulkner ignores, however, that The Citadel was obliged to offer this "justification" only because the court of appeals, first in *VMI* and then in this case, addressed not only the constitutionality of VMI's and The Citadel's males-only admissions policies, but also the issue (not raised by *any* party) whether the failure to provide a single-sex program to women was itself justified.

whether South Carolina is constitutionally required to establish such an all-female program as merely relating to the proper "remedy" for defendants' supposed equal protection violation. *See* U.S. Opp. at 9-10; Faulkner Opp. at 15. As we have demonstrated above, however, the Fourth Circuit's *liability* determination against defendants was based on the absence of an all-female military institution like The Citadel. In light of this fact, and in light of the *undisputed* fact that neither plaintiff has alleged a personal stake in the question whether defendants were constitutionally required to establish such an all-female military program, there is simply no "case or controversy" between the parties with respect to that question. At the very least, the justiciability issue raised in our petition is sufficiently substantial and important to warrant the Court's review.

Nor is there any merit in the United States' contention that acceptance of our justiciability argument "would simply remove [the] remedial option" of establishing an "all-female Citadel" and would thus require defendants to "remedy" their alleged equal protection violation by coeducating The Citadel. U.S. Opp. at 11; *see also* Faulkner Opp. at 13. If we are right that the courts below lacked jurisdiction to decide the "all-female Citadel" issue, the question of remedy does not arise at all, for the only question that the courts did have jurisdiction to decide – whether The Citadel's males-only admissions policy satisfies the test this Court laid down in *Hogan* – was decided in *defendants'* favor.

Finally, both Faulkner and the United States rely heavily – indeed, exclusively – on this Court's decision in *Heckler v. Mathews*, 465 U.S. 728 (1984), for their answer to the jurisdictional question raised in our petition. This Court held in *Mathews* that a male applicant for social security benefits had standing to challenge a gender classification codified in the social security laws even though invalidation of the classification could result in the denial of benefits to both men and women rather than in the extension of benefits to men. The *Mathews* Court held that the male applicant nonetheless had standing because his injury was the denial *to him* of equal treatment. *Id.* at 737-40. For present purposes, however, what is significant about *Mathews*, and what distinguishes that case from this one, is that the plaintiff in *Mathews sought and applied for* the social security benefits at

issue. Here, in contrast, both Faulkner and the United States have sought only coeducation of The Citadel and have unequivocally opposed the establishment of a parallel military program for women. *Mathews* would be helpful to plaintiffs only if we were contesting plaintiffs' standing to challenge The Citadel's exclusion of women. But neither *Mathews*, nor any other case of which we are aware, has so stretched the limits of standing doctrine to suggest that plaintiffs who have unequivocally renounced any interest in attending an all-female military institution nevertheless have standing to challenge the absence of such an institution.[3] Rather, this Court's decisions are uniformly to the contrary. *See* Pet. at 17-20.

4. Quite apart from the fact that the courts below lacked jurisdiction to reach the question whether the absence of an all-female educational program violates the Equal Protection Clause, the undisputed lack of demand in South Carolina for an all-female military institution like The Citadel constitutes a complete defense to such a claim. The United States' and Faulkner's response to our "lack of demand" argument is twofold.

First, they argue that the lack of demand issue does not warrant this Court's review because it is "fact-based," U.S. Opp. at 11, and both the district court and the Fourth Circuit found that there was no evidence of such a lack of demand. *See* U.S. Opp. at 11-12; Faulkner Opp. at 16-17. The district court, however, specifically found that "[t]here does not appear to be any substantial interest in South Carolina for the establishment of an all-female military institution like The Citadel." *Faulkner*, 858 F. Supp. at 560

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[3] As previously noted, the United States has recognized that "any issue with respect to [Faulkner's] standing [to challenge The Citadel's males-only admissions policy] is now moot in view of her withdrawal from The Citadel." U.S. Opp. at 9 n.10. This conclusion, however, is inconsistent with the United States' position on the justiciability issue. If the United States' expansive reading of *Mathews* is correct, then Faulkner's withdrawal from The Citadel should not moot her challenge to The Citadel's admission policy, because, irrespective of the fact that she no longer seeks admission to the Corps of Cadets, The Citadel's admission policy still denies "equal treatment" to women, and that denial of "equal treatment" can be "remedied" by the cessation of public support for The Citadel. The fact that the United States cannot bring itself to embrace the logical implications of its argument is telling.

(Faulkner Pet. 46a). The court of appeals did not question, and could not responsibly have questioned, the validity of the district court's conclusion that there is no significant interest in an all-female military institution like The Citadel. Rather, Judge Niemeyer, the author of the panel majority opinion, focused on the broader issue of female demand for single-gender education in general. As we have explained at length in our petition, Pet. at 22, 25, 28, Judge Niemeyer erred as a matter of law in defining the relevant inquiry, in assessing liability, as female demand for single-gender higher education generally, as opposed to demand for an all-female military program like The Citadel. Pet. at 22, 28. Significantly, neither the United States nor Faulkner responds to this point. Rather, both Faulkner and the United States focus upon the court of appeals' statement that "the attorney representing South Carolina . . . concede[d] at oral argument, [that] there really is no data before this court to support a finding of an absence of demand among women at the present time for public single-gender education of any type." *Faulkner II*, 51 F.3d at 446 (Faulkner Pet. 9a). *See* Faulkner Opp. at 7; U.S. Opp. at 12, 13 n.13.

Notwithstanding Judge Niemeyer's reference to demand for single-gender education "of any type," even a cursory review of the relevant portion of the transcript of the Fourth Circuit oral argument demonstrates that the "concession" to which the court of appeals was referring has nothing to do with the relevant demand issue in this case. Counsel for South Carolina made clear that the district court found below that there was *no* interest for a "military college for women in South Carolina." Transcript of Oral Argument held Jan. 30, 1995 in *Faulkner II* at 17. Judge Niemeyer then stated that the last "evidence we had was 2300 women." *Id.* This figure, however, does not relate to the level of demand for an all-female Citadel, but rather to the number of women attending Winthrop College shortly before that college became coeducational in the early 1970's. Noting that that number was from 20 years ago, Judge Niemeyer then stated that "[w]e don't have any data then," apparently referring to the absence of any *current* data. South Carolina's counsel replied "[w]e really don't." *Id.* As this passage illustrates, counsel's statement constitutes, at most, a "concession" that there is no current data on how many women would attend Winthrop College if Winthrop were still a single-gender

institution. It is *not* a "concession" that there is no evidence relating to the level of demand for an all-female Citadel.[4] Indeed, any such "concession" would be belied by the record, which contains ample evidence that there is no significant demand in South Carolina for an all-female Citadel. *See* Pet. at 9.

In addition to disingenuously suggesting that there is no evidence of lack of demand among women for an all-female military institution like The Citadel, both Faulkner and the United States also argue, based upon race discrimination cases of this Court from the separate-but-equal era, that any such lack of demand is legally irrelevant. Faulkner Opp. at 18-19; U.S. Opp. at 13-14. As we have noted, Pet. at 27-28, under the pre-*Brown* equal protection standard applicable in cases such as *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) and *McCabe v. Atchison, T. & S.F. Ry.*, 235 U.S. 151 (1914), a state's exclusion of blacks, even a single black, from a state-supported educational program was permissible *only* if the state provided an equivalent program to blacks. Since equality of treatment was the only constitutionally adequate justification for the separation of the races under these cases, a state could not decline to provide equal treatment to particular individuals merely because there was limited overall demand for an equivalent program. In this case, by contrast, equality of treatment is *not* the justification for The Citadel's males-only admissions policy. Rather, in upholding the males-only admission policies of both The Citadel and VMI, the Fourth Circuit found, based on an unrebutted record of expert testimony and scholarly literature, that a single-sex educational environment is pedagogically beneficial to a substantial number of college students, both male and female, and that the pedagogical benefits of

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[4] Far from conceding that there is no evidence of demand for an all-female Citadel, counsel for The Citadel emphatically agreed at oral argument with Judge Hamilton's statement that no one had challenged the district court's finding "that there was little or no demand in South Carolina for a . . . single-gender, female Citadel-type education." Transcript at 4.

In contrast to the nonexistent demand for an all-female Citadel, South Carolina's women's leadership institute at Converse College, modeled after the program at Mary Baldwin College in Virginia, has 23 enrollees in its initial school year which recently began, even though recruiting for this program did not start until late June.

single-sex higher education would be lost if these institutions were coeducated. Given that The Citadel's males-only admission policy is constitutionally justified, it follows as a matter of common sense that an all-female military institution like The Citadel need not be established in the absence of any demand for it.

5. Finally, the United States argues that our petition is premature in light of the pendency of the district court's remedial proceedings. U.S. Opp. at 15. This argument is once again premised on the facially erroneous claim that our petition raises questions relating only to the issue of remedy. In truth, both questions raised in our petition relate to *liability*, not *remedy*, and thus will be unaffected by the district court's decision on the adequacy of our proposed remedy.[5]

The usual concerns cautioning against review by this Court of nonfinal decisions are not implicated here. While the Court has expressed its reluctance to review nonfinal judgments out of a concern that a contrary policy would result in an excessive "burden of litigation in this court," *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 382 (1893), in the instant case the Court already has before it two requests to review the final judgment in *VMI*, a judgment which raises issues that are closely related to those raised here by defendants. In fact, the substantial similarity of the factual records in both this case and *VMI*, and the fact that this case raises liability issues – such as the lack of demand issue – which are not raised in *VMI*, suggest that the interests of judicial economy would be well served by reviewing these cases at the same time.

This Court has on many occasions granted certiorari to review nonfinal judgments when the usual concerns counseling against

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[5] The United States' confusion on this point is apparent from its statement that if our proposed remedy "does not pass constitutional muster, petitioners, who do not otherwise challenge the court of appeals' liability decision, will have to adopt an alternative remedy, such as a sex-neutral admissions policy at The Citadel. Adoption of that remedy would obviate any need to address the questions petitioners seek to raise here." U.S. Opp. at 15-16. Because the United States' assertion that we "do not otherwise challenge the court of appeals' liability decision" is patently wrong, so also is its conclusion that an "adverse decision in the remedial proceeding would obviate any need to address the questions" we have raised in our petition.

such review are not present or where the issues sought to be reviewed are sufficiently important.[6] Given the importance of the questions raised by our petition, and the fact that this Court already has before it a request to review a similar case, the Court should not deny our petition as premature.

Respectfully submitted,

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[6] *See, e.g., Estelle v. Gamble*, 429 U.S. 97 (1976); *United States v. GMC*, 323 U.S. 373, 377 (1945); *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); *Land v. Dollar*, 330 U.S. 731 (1947).

(6) (4)

Nos. 95-31, 95-258

Supreme Court, U.S.
FILED
SEP 25 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

SHANNON RICHEY FAULKNER,

Petitioner/Respondent,

and the

UNITED STATES OF AMERICA,

Respondent,

v.

JAMES E. JONES, JR., *et al.*,

Respondents/Petitioners.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MEMORANDUM IN OPPOSITION TO MOTION OF NANCY MELLETTE TO ADD PARTY OR TO INTERVENE

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MEMORANDUM IN OPPOSITION TO MOTION OF NANCY MELLETTE TO ADD PARTY OR TO INTERVENE

James E. Jones, Jr., The Citadel, the Military College of South Carolina ("The Citadel"), and the State of South Carolina, *et al.*, respondents in No. 95-31 and petitioners in No. 95-258, respectfully submit this memorandum in opposition to the Motion of Nancy Mellette ("Mellette") to Add Party or to Intervene ("Motion"). (The Citadel and South Carolina are both respondents and petitioners before this Court, so we will refer to them herein collectively as "defendants.") Because the Motion is a transparent – and untimely – attempt on the part of the lawyers for Shannon Richey Faulkner ("Faulkner"), petitioner in No. 95-31 and respondent in No. 95-258, to resuscitate Faulkner's moot petition for writ of certiorari, and because the Motion does not in any event meet the standards for the addition or intervention of parties before this Court, the extraordinary relief sought by the Motion must be denied.

STATEMENT

On July 10, 1995, Faulkner filed her petition for certiorari in No. 95-31, seeking review of the "remedial aspect" of the Fourth Circuit's decision in *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995) (*"Faulkner II"*). Motion at 3. Defendants, who had sought and received an extension of the time within which to file a petition for writ of certiorari, timely filed their petition in No. 95-258 on August 11, 1995. Pursuant to the Fourth Circuit's decision in *Faulkner II*, Faulkner entered The Citadel on August 12, 1995. On August 18, 1995, however, Faulkner voluntarily withdrew from The Citadel. On September 11, 1995, Faulkner's lawyers filed the instant Motion on behalf of Mellette.

ARGUMENT

In a last-ditch effort to preserve their involvement in this case, Faulkner's lawyers seek to insert into these proceedings – two and a half years after this action was initiated *and at the Supreme Court level* – an entirely new person who will supposedly just pick up Faulkner's mooted petition and proceed with Faulkner's case as if nothing had ever happened. They admit that this remarkable request is prompted by their fear that Faulkner's claims have become moot. Acknowledging that Faulkner "has withdrawn from the Corps of Cadets and is not currently pursuing a Citadel education," Faulkner's lawyers concede "the potential argument that her claims are moot." Motion at 5. *See also id.* at 17a. Faulkner's claims, however, are not "potentially" moot; they are moot beyond a doubt, as demonstrated in our Memorandum Suggesting Mootness of Petition for Writ of Certiorari of Shannon Richey Faulkner, filed September 19, 1995. The United States recognizes this obvious and inescapable conclusion. *See* Brief for the United States in Opposition, at 7 n.4, *Jones v. Faulkner* (No. 95-258).

Mellette's access to this Court is foreclosed for three reasons. First, she seeks by her Motion to be added or to intervene not as a party to this *case*, but as a party to a certiorari *petition* that no longer exists, as a matter of law. When Faulkner voluntarily withdrew from The Citadel, she mooted her petition, and neither Mellette nor this Court can now raise it from the dead. Second, even if Mellette satisfied the requirements under the Federal Rules of Civil Procedure for addition to or intervention in this *case*, she would have to file her own petition for writ of certiorari, which would now be jurisdictionally out of time. Finally, because Mellette's interests in this case are adequately protected by the United States, she does not satisfy the most basic requirement for injecting herself into these proceedings, either as a petitioner or as a respondent.

1. Mellette does not seek in her Motion to be added or to intervene as a party *to this case*. Rather, she "seeks to be added or to intervene as a party to *the two Petitions* presently before the Court." Motion at 4 (emphasis added). This Court, however, no longer has jurisdiction over Faulkner's petition in No. 95-31 since that petition is now moot. Put simply, when Faulkner voluntarily withdrew from The Citadel, there was no longer any live petition before this Court to which Mellette could be added or in which Mellette could intervene as a petitioner.

In none of the cases cited in the Motion has this Court allowed an entirely new person to be added or to intervene as a party to a certiorari petition *after* the original petition had been rendered moot. In *Rogers v. Paul*, 382 U.S. 198 (1965), the case on which Mellette principally relies, new petitioners were added by this Court while the original petition was still live and justiciable; at least one of the original named plaintiffs was still in high school at the time, and his petition for review of a desegregation decision in a class action case thus had not been rendered moot. Nor is Mellette's request supported by *Mullaney v. Anderson*, 342 U.S. 415 (1952). In that case, additional parties were added as *respondents*, not as petitioners. Accordingly, there was no issue in *Mullaney* concerning the ability of a prospective party to rejuvenate a moot certiorari petition.

Not surprisingly, the few cases that are relevant to Mellette's motion foreclose her extraordinary request. The addition or intervention of a party presupposes the pendency of a *live* petition. *See, e.g., United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 163-64 (1914) ("These rights to intervene and to file a claim, conferred by the statute, presuppose an action duly brought under its terms. In this case the cause of action had not accrued to the creditors who undertook to bring the suit originally. The intervention could not cure this vice in the original suit."). *See also Aeronautical Radio, Inc. v. FCC*, 983 F.2d 275, 283 (D.C. Cir. 1993) (dismissing

prospective intervenor who lacked independent jurisdictional basis for challenge to rule where the court lacked jurisdiction over the proceeding in which intervention was sought); *Simmons v. ICC*, 716 F.2d 40, 46 (D.C. Cir. 1983) (dismissing intervenor when original petitioner lacked jurisdictional basis for petition and intervenor did not file intervention request within 60-day time limit for filing petition for review); *Fuller v. Volk*, 351 F.2d 323, 328 (3d Cir. 1965) ("It is well-settled that since intervention contemplates an existing suit in a court of competent jurisdiction and because intervention is ancillary to the main cause of action, intervention will not be permitted to breathe life into a 'nonexistent' lawsuit.").[1] Because this Court has no jurisdiction over Faulkner's moot petition, Mellette's Motion must be denied

2. In addition to her request to be added or to intervene as a party to the certiorari petitions before this Court, Mellette has also moved in the district court "to intervene as a plaintiff and to be designated as a class representative" in this case. Motion at 4. But even if she could satisfy the requirements for intervention as a party plaintiff to this case, any effort by her to seek this Court's review of the court of appeals' decision in *Faulkner II* is

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[1] The same result obtains with respect to a request, under Rule 21 of the Federal Rules of Civil Procedure, to add a new petitioner. Rule 21 "contemplates the retention of one or more parties in the action and is not a method for substituting the sole plaintiff or defendant in the case with another party." 7 Wright, Miller and Kane, *Federal Practice and Procedure: Civil* § 1686 at 463. Thus, Rule 21 was not intended " to deal with problems of defective federal jurisdiction." *Fox v. Board of Trustees of the State Univ. of New York*, 148 F.R.D. 474, 484 (N.D.N.Y. 1993), *aff'd*, 42 F.3d 135 (2d Cir. 1994) (quoting *Field v. Volkswagenwerk AG*, 626 F.2d 293, 306 (3d Cir. 1980) (quoting *Kerr v. Compagnie De Ultramar*, 250 F.2d 860, 864 (2d Cir. 1958))). In short, "Rule 21 cannot be employed as a means to create a case or controversy through substitution where one no longer exists." *Fox*, 148 F.R.D. at 486.

now jurisdictionally out of time. Faulkner filed her petition on July 10, 1995, two days before the expiration of the 90-day time period within which a petition could be filed. The instant motion was filed over sixty days after the deadline for the filing of a petition for writ of certiorari had passed.

Just last term this Court reaffirmed the nonwaivable jurisdictional nature of the 90-day limit for filing certiorari petitions in civil cases and rejected an untimely effort to breathe life into a jurisdictionally defective petition. In *Federal Election Commission v. NRA Political Victory Fund*, ___ U.S. ___, 115 S. Ct. 537 (1994), the Federal Election Commission ("FEC") timely filed a certiorari petition, although it lacked at the time the statutorily required authorization of the Solicitor General. The Solicitor General attempted to "cure" this defect in the FEC's certiorari petition by retroactively authorizing the FEC's action. Because the Solicitor General's authorization, however, came well after the deadline for filing a petition had passed, this Court held that the authorization "simply came too late in the day to be effective" and dismissed the petition for want of jurisdiction. *Id.* at 543. The decision in the *NRA Political Victory Fund* case is fully applicable here. For even if Mellette's Motion could somehow be construed as a certiorari petition, it simply comes "too late in the day to be effective." *Id.* at 543.[2]

3. In any event, Mellette's attempt to revive Faulkner's moot petition, and to be added or to intervene as a respondent with respect to defendants' petition, fails to

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[2] *See also United Airlines, Inc. v. McDonald*, 432 U.S. 385, 392, 395 n.16 (1977) (affirming decision that district court should have granted motion for leave to intervene for purposes of appealing decision denying class certification; motion was timely in part because it "complied with, as it was required to, the time limitation for lodging an appeal prescribed by Fed. R. App. Proc. 4(a).").

meet the requirements of the Federal Rules of Civil Procedure. Rule 24(a)(2) prohibits intervention of right if the prospective intervenor's "interest is adequately represented by existing parties." In this case, the United States argued in its own intervention motion in the district court that it "seeks the full vindication of the rights of women to equal educational opportunity at The Citadel." Brief of United States in Support of Its Motion to Intervene at 3.[3]

When the United States represents the interests of persons seeking to intervene, the representation of the United States is presumed to be adequate. *See* 7C Wright, Miller and Kane, *Federal Practice and Procedure: Civil* § 1909 at 342. *See, e.g., United States v. City of Philadelphia*, 798 F.2d 81, 90 (3d Cir. 1986). Thus, in *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961), the Court rejected a motion to intervene filed by parties who charged that the United States did not adequately represent their interests in negotiations relating to an antitrust decree. The Court noted, without deciding, that intervention was not appropriate "in the absence of any claim of bad faith or malfeasance on the part of the Government . . . " 366 U.S. at 689. *See also United States v. South Bend Community School Corp.*, 710 F.2d 394 (7th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984). It is similarly well-established that a prospective intervenor who has the same ultimate objective or who seeks the same ultimate relief as an existing party must make a very compelling showing that the party's representation is inadequate. *See League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 884 F.2d 185, 189 (5th Cir. 1989); *South Bend*, 710 F.2d at 396;

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[3] At a hearing held in the district court, the court inquired whether the Department of Justice had "intervened as a Plaintiff intervenor for all other women." Ms. Beber, a Justice Department attorney, responded, "Yes, Sir." Hearing Transcript at 183 (Aug. 10, 1994).

Virginia v. Westinghouse Elec. Corp., 542 F.2d 214, 216 (4th Cir. 1976). Thus, in cases in which a party seeks relief identical to that sought by the prospective intervenor, or in which the United States represents the interests of the prospective intervenor, intervention should be denied in the absence of a clear demonstration of bad faith or of "adversity of interest, collusion, or nonfeasance." *Westinghouse*, 542 F.2d at 216.

Mellette has utterly failed to rebut the presumption of the adequacy of the United States' representation of her interests. Far from showing that the United States has an interest adverse to her own or that it has acted incompetently, collusively, or in bad faith in this case, her only argument is that "the United States cannot represent the interests of individual plaintiffs such as Ms. Mellette before the Court, since the United States has not sought review of the Fourth Circuit's decision." Motion at 3 n.2; *see also id.* at 7 n.4. As an initial matter, this argument says *nothing* about the adequacy of the United States' representation of Mellette's interests as a *respondent* with respect to defendants' certiorari petition in 95-258. And, as the briefs in opposition to defendants' petition reveal, the interests of the United States and Faulkner (and therefore Mellette) are identical. Both Faulkner's lawyers and the United States raised the same objections to defendants' petition and relied on virtually the same authority in support of their arguments.[4]

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[4] In the district court, the United States has stated that it does not oppose Mellette's motion to intervene as a party plaintiff. Although the United States noted the "obvious overlap between the public interest of the United States in enforcing the Equal Protection Clause to the Constitution and the private interest of individual women," it nonetheless stated that "there is no identity of interest between the United States and individual citizens affected by this litigation." Response of the United States to Cross-Motion for Intervention and Renewal of Motion for Class Certification, dated September 8, 1995. The United

In any event, the fact that the United States has chosen not to seek, *at this time*, this Court's review of the Fourth Circuit's decision hardly demonstrates the inadequacy of the United States' representation of Mellette. Mere tactical differences between parties with common substantive interests generally will not warrant intervention. *See, e.g., United States v. Philadelphia, supra.* The United States has not *foregone* the opportunity to seek review of the remedial issues decided by the Fourth Circuit, but has merely argued that review of these issues is premature at this time. Memorandum for the United States in Opposition ("U.S. Mem.") at 7, *Faulkner v. Jones* (No. 95-31).[5] Indeed, the United States has made clear that it agrees that the issues raised in Faulkner's petition are worthy of this Court's review, and it has sought review of those same remedial issues in its pending petition for writ of certiorari in *United States v. Virginia*, No.

States offered no support for this statement, and the history of this litigation flatly contradicts it.

[5] In contrast, in *Bryant v. Yellen*, 447 U.S. 352 (1980), the Court allowed persons who had been represented by the United States to intervene where the Solicitor General had decided to forego an appeal of the district court's opinion. Similarly, in both *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969), and *Banks v. Chicago Grain Trimmers Association*, 389 U.S. 813 (1967), 390 U.S. 459 (1968), intervention was allowed where the parties who represented the prospective intervenors decided to completely forego requesting this Court's review of adverse decisions.

94-1941.[6] Moreover, the United States is currently vigorously contesting the constitutional adequacy of defendants' proposed remedy in the district court.[7]

Finally, as a general rule, where intervention as of right is denied because of adequate representation by a party seeking the same relief, permissive intervention is equally inappropriate. *See, e.g., Hoots v. Pennsylvania*, 672 F.2d 1133, 1136 (3d Cir. 1982); *League of United Latin Am. Citizens*, 884 F.2d at 189. *See also New Jersey v. New York*, 345 U.S. 369 (1953). To the extent, therefore, that Mellette seeks permissive intervention, her motion should be denied for the same reasons discussed above.

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[6] *See* U.S. Mem. at 6 (Faulkner's certiorari petition "presents an issue of importance calling for this Court's review."); *id.* at 7 ("This Court will . . . have an opportunity to review and decide" the issues raised in Faulkner's petition, "because the same issues are presented in the United States' pending petition for a writ of certiorari in [*United States v. Virginia*], No. 94-1941.") (footnote omitted).

[7] For this reason, Mellette's claim that a denial of her motion will result in "needless and wasteful" litigation is meritless. Motion at 4, 5. If her motion is denied, there will be no need for her to relitigate the issues presented in this case; the United States will continue to represent her interest in gaining admission to The Citadel.

CONCLUSION

For the foregoing reasons, Mellette's Motion should be denied.

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Dated September 25, 1995

No. 95-31
No. 95-258

(1)
(5)

Supreme Court, U.S.
FILED
OCT 2 1995
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In the

Supreme Court of the United States

October Term, 1995

SHANNON RICHEY FAULKNER, individually and on behalf of all others similarly situated,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

and

JAMES E. JONES, JR., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPPOSITION OF SHANNON RICHEY FAULKNER TO MEMORANDUM SUGGESTING MOOTNESS AND REPLY MEMORANDUM OF NANCY MELLETTE IN SUPPORT OF MOTION TO ADD PARTY OR INTERVENE

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Neither the Memorandum Suggesting Mootness (the "Memorandum") filed by The Citadel and the State of South Carolina ("Respondents"), nor their Opposition to the Motion to Add Party or to Intervene (the "Motion") filed by Nancy Mellette, has any merit.

1. The issues raised by the Petitions are vital and justiciable. Respondents argue that Shannon Faulkner "voluntarily" withdrew from The Citadel and, therefore, no longer has any personal stake in the outcome of this litigation. Memorandum at 2, 6. Neither the facts nor the law supports such a rigidly formalistic interpretation of Article III jurisdiction.

a. Ms. Faulkner is entitled to reapply for admission to The Citadel and, therefore, retains a personal stake in the outcome of this litigation. Ms. Faulkner did not graduate from The Citadel, but withdrew under tremendous pressure and illness, which Respondents do not dispute. She is not attending any other college at this time and has expressed an interest in reapplying if other women are admitted. Respondents do not dispute that, like male cadets who withdraw for medical reasons, Ms. Faulkner is entitled to reapply for admission and resume her education at The Citadel. Under these circumstances, she continues to have a personal stake in the outcome of this litigation, which will determine whether women will be permitted to attend The Citadel.

Respondents have not cited a single case where a court has dismissed the claim of a student challenging an educational policy where the student is still eligible to receive the benefit. They deliberately ignore recent precedent reflecting the Court's pragmatic approach toward mootness analysis in the class action context, instead citing a string of older cases which were not brought as class actions or which are otherwise distinguishable from the facts and circumstances of this case.[1]

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[1] Respondents rely primarily upon mootness decisions in cases involving a single plaintiff that, unlike this case, were not brought as class actions. *See, e.g., Murphy v. Hunt*, 455 U.S. 478, 482 (1982); *Preiser v.*

(Footnote continues on following page)

Respondents also ignore that the legal battle continues unabated over the constitutionality of The Citadel's exclusion of women and its proposal to remedy that violation by segregating women in a separate and non-military program. In the five weeks since Shannon Faulkner withdrew, more than 50 women have written to The Citadel for applications and information about the Corps of Cadets; at least two women have submitted applications for admission, including Nancy Mellette. The district court has scheduled a trial for November 6, 1995 to review South Carolina's proposal for creating a separate and intentionally unequal, non-military program for women at Converse College. In addition, Respondents filed a petition for certiorari with this Court seeking review of the Court of Appeals' decision in *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995) ("*Faulkner II*"), that The Citadel's discriminatory admissions policy violates the right of Ms. Faulkner, and all women, to equal protection. Ms. Faulkner filed a memorandum in opposition to Respondents' petition, and Respondents do not contend that she has no interest in opposing their petition.

Ms. Faulkner has not been dismissed from the action below, and the United States continues to prosecute its claim. Her interest in defending the decision that her right to equal

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(Footnote continued from preceding page)

Newkirk, 422 U.S. 395, 402 (1975); *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974). Although the plaintiff in *Mills v. Green*, 159 U.S. 651, 653 (1895), had sued on behalf of other citizens for an injunction permitting him to vote in one election, the Court held the "matter in issue in the case" had been mooted after the election occurred. In the instant case, the *matter* is not mooted: the United States remains a party, and Nancy Mellette and other women seek admission. While *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 430 (1976), was originally filed as a class action, there is no indication that the plaintiffs ever attempted to certify the class or to substitute other plaintiffs after the original named plaintiffs graduated from high school. As in *Pasadena*, the presence of the United States in this case insures that the case is not moot. Unlike the high school students in *Pasadena*, who had graduated from high school, Ms. Faulkner is entitled to reapply and complete her college education at The Citadel.

protection has been violated continues, as well as her interest in preserving her right to choose to attend the public college of her choice. Moreover, the district court has scheduled a hearing on October 3, 1995 for Ms. Faulkner's class certification motion, which has been pending for over two years. If class certification is granted, there will no longer be any issue concerning the mootness of Ms. Faulkner's petition for certiorari. *See Sosna v. Iowa*, 419 U.S. 393 (1975); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980).

Ms. Faulkner's petition seeks review of the blatantly unconstitutional "special equal protection test" adopted by the Fourth Circuit. The substantial legal question that it presents directly will affect the rights of Nancy Mellette and over 50 other young women who now seek admission to The Citadel.

b. *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), controls the situation at hand. The plaintiff in *Geraghty* was a prisoner who filed a class action challenging the legality of federal parole release guidelines. *Id.* at 391-92. The district court denied class certification and then granted summary judgment for the defendants. *Id.* at 393. The plaintiff appealed both the denial of class certification and the final judgment, but before the case reached the Supreme Court, the plaintiff was released from prison, raising the potential argument that his claims were moot. *Id.* at 394-95. The defendants argued, as Respondents do here, that "where no class has been certified, there is no party before the Court with a live claim, and it follows . . . that [the Court has] no jurisdiction . . . ." *Id.* at 401. The Court disagreed, holding instead that "an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied." *Id.* at 404.

The Court held that "mootness has two aspects: 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Id.* at 396 (citation omitted). The Court found that the controversy over the parole release guidelines was still a live dispute between the defendants "and at least some members of the class [the plain-

tiff] seeks to represent." *Id.* As evidence of the vitality of the controversy, the Court observed that prisoners currently affected by the guidelines had moved to intervene at the Supreme Court level. *Id.* In addition, the Court held that the prisoner plaintiff still had a personal stake in obtaining class certification. After a detailed discussion of "the flexible character of the Art. III mootness doctrine," *id.* at 400, the Court concluded that the named plaintiff had a personal stake in obtaining class certification and that the district court could determine whether he or another plaintiff would be an appropriate class representative on remand. *Id.* at 404-7.

The Court's reasoning, as well as its holding, is dispositive in the instant case, which mirrors *Geraghty*. The issues raised in Ms. Faulkner's petition for certiorari are clearly live for Nancy Mellette and the scores of other women who want to attend the military-style program at The Citadel. As in *Geraghty*, the motions of Nancy Mellette to intervene in the district court and this Court evidence the continued vitality of this dispute, as do the many inquiries and applications from women that have poured into The Citadel since Ms. Faulkner's withdrawal. Even were it determined that she had no other stake in this litigation, *Geraghty* illustrates that Ms. Faulkner has a personal stake in obtaining certification of a plaintiff class in the district court. Her interest is even more compelling than that of the *Geraghty* plaintiff, since her motion for class certification has not been denied, but rather has not yet been ruled on by the district court.

c. In addition, Ms. Faulkner's claim is not moot because it falls within the "capable of repetition, yet evading review" exception to the mootness doctrine. The Citadel continues to unlawfully exclude all women, including Nancy Mellette, from admission. Moreover, the possibility Ms. Faulkner may reapply for admission alone is sufficient to prove that The Citadel's discriminatory policy is "capable of repetition." In *Carroll v. Blinken*, 768 F. Supp. 1030, 1031 n.1 (S.D.N.Y. 1991), *aff'd in part and rev'd in part on other grounds*, 957 F.2d 991, 993 n.2 (2d Cir.), *cert. denied*, 113 S. Ct. 300 (1992), the Second Circuit cited with approval the refusal of the dis-

trict court to dismiss as moot the First Amendment claim of a college student who was dismissed from school for academic reasons after filing the action. *See also Honig v. Doe*, 484 U.S. 305, 318 (1988). Like Ms. Faulkner, the plaintiff had not applied for readmission, but the court nevertheless held that, under the school's policy, "he may choose to do so, and it is reasonable to expect that he would then again raise the same claim which was fully litigated in the trial before me." *Carroll*, 768 F. Supp. at 1031.

Contrary to Respondents' assertion, the duration of the challenged action is too short to permit the litigation of its constitutionality. The harm suffered by Ms. Faulkner and other women is the denial of their choice and ability to attend The Citadel. That harm does not automatically continue for four years, as Respondents suggest. Because The Citadel does not permit students to transfer into its program after the beginning of their junior year, Ms. Faulkner and other women at best have only two years in which to litigate their claims. This case, which has been expedited by the district court and the court of appeals, has already lasted over two and one-half years. The protracted length of this litigation proves beyond a doubt that an individual woman is unlikely to attain any affirmative relief in two years.

d. To declare Ms. Faulkner's petition moot would not serve the ends of justice or equity, but only assist The Citadel and South Carolina in insulating themselves from any meaningful review of the decision below. Respondents have filed a petition for certiorari, asking this Court to review the liability determination of *Faulkner II*. If neither Ms. Faulkner nor Ms. Mellette is permitted to challenge the remedial portion of *Faulkner II*, Respondents will likely argue that they are barred from raising that issue again. "[W]hile an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it." *Honig*, 484 U.S. at 331 (Rehnquist, J., concurring). This case surely presents such reasons.

2. Nancy Mellette is entitled to be added as a party to the petitions under Rule 21 or, alternatively, to intervene under Rule 24 of the Federal Rules of Civil Procedure. Respondents do not dispute that Nancy Mellette has a substantial interest in attending The Citadel that is likely to be determined by the outcome of this litigation. No other party in *Faulkner* or *VMI* is raising the same constitutional questions as those presented in Ms. Faulkner's petition, adopted by Ms. Mellette. If Ms. Mellette is forced to work her way up from the district court to raise the same issues now presented by Ms. Faulkner's petition, the courts, the parties and the taxpayers of South Carolina will be needlessly burdened by Respondents' litigation strategy. Joinder at this point in the litigation promotes judicial economy and saves expense for all parties.

a. Respondents assert that Ms. Mellette has not sought to intervene in this case and that she is not entitled to intervene in the two petitions because Ms. Faulkner's petition is moot. Respondents' argument is pure sophistry. First, Ms. Mellette has filed a motion to intervene in the underlying action in the district court, which is scheduled for argument on October 3, 1995. Second, Ms. Mellette is entitled to intervene to petition this Court for certiorari to review the decision below in *Faulkner II*, regardless of whether this Court dismisses Ms. Faulkner's petition on grounds of mootness. A new party is permitted to intervene in this Court under Fed. R. Civ. P. 24 regardless of whether an existing party has filed a petition for certiorari. This Court has granted leave to intervene to file a petition for certiorari to persons who were not parties in the courts below even where no petition is pending regarding the lower court ruling at issue. *See Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969) (petitioner, not party to proceedings below, permitted to intervene to file petition for certiorari even where party who had represented petitioner below declined to seek certiorari); *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968) (same). Nancy Mellette, like the petitioners in *Hunter* and *Banks*, has interests that will be vitally affected by this litigation. Even assuming

arguendo that Ms. Faulkner's claims are moot, Nancy Mellette is entitled to intervene independently for purposes of filing her own petition.[2]

b. Respondents incorrectly assert that Nancy Mellette is jurisdictionally barred from filing a petition for certiorari because her Motion was filed more than 90 days after the decision below was entered. Respondents are invoking the wrong deadline. Ms. Mellette's Motion, which adopts in full Ms. Faulkner's petition for certiorari, was filed on September 11, 1995, within 30 days after Respondents filed their petition for certiorari on August 11, 1995. Under Supreme Court Rule 12.3, Nancy Mellette's Motion qualifies as a cross-petition for certiorari.[3] By adopting the petition for certiorari filed by Ms. Faulkner, Ms. Mellette satisfied all of the requirements of Rule 12.3 governing a cross-petition's form and substance.

c. Respondents also assert that Ms. Mellette is not entitled to be added as a party to the petition under Fed. R. Civ. P. 21 because the Rule "contemplates the retention of one or more parties in the action" and should not be used to substitute the sole plaintiff in a case with another party. Because the United States remains a party to the *Faulkner* litigation, the addition of Ms. Faulkner would not create a case or controversy where none presently exists. Even assuming that Ms. Faulkner was the sole plaintiff in this action, courts have used Rule 21 to add additional parties to substitute for plain-

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[2] The cases cited by Respondents are plainly inapplicable. Each involve attempts to intervene or add parties to actions that were jurisdictionally defective *when originally filed*. Ms. Faulkner indisputably had standing to commence this action and to file this petition.

[3] The Court has construed various pleadings liberally as petitions for certiorari when it wished to address the questions presented therein. *See, e.g., Kuntz v. Shawmut Bank*, 488 U.S. 952 (1988) (petition for writ of mandamus treated as petition for certiorari); *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44 (1977) (application for stay treated as petition for certiorari).

tiffs whose claims have become moot. *See, e.g., Graves v. Walton County Bd. of Educ.*, 686 F.2d 1135 (1982).

d. Respondents' attempts to distinguish *Rogers v. Paul*, 382 U.S. 198 (1965), and *Mullaney v. Anderson*, 342 U.S. 415 (1952), are unavailing. Respondents argue that *Rogers* is inapplicable because the petition was not moot since one of the original named plaintiffs was still in high school. Respondents neglect to mention that that plaintiff was in the middle of his last year of high school, which under Respondent's analysis would obviously render moot the plaintiff's interest in a desegregated high school system to be implemented in the future. *See Rogers*, 382 U.S. at 199. Respondents attempt to distinguish *Mullaney* on the ground that the parties added in that case were respondents, not petitioners. Aside from the fact that Nancy Mellette too seeks to be added as a respondent in the petition brought by The Citadel and South Carolina, *Mullaney* is applicable because the original respondents were the parties plaintiff who had instituted the lawsuit. *Mullaney*, 342 U.S. at 416-17. If they were deemed without standing, the Court acknowledged, the parties would have to start over in the district court unless addition of the new respondents was permitted. *Id.* The same rationale applies to the addition of Ms. Mellette.

e. Nancy Mellette's intervention is necessary under Fed. R. Civ. P. 24(a) and appropriate under Fed. R. Civ. P. 24(b). Contrary to Respondents' assertion, the United States is quite obviously not an adequate representative for Ms. Mellette's interests. The presence of the United States as a plaintiff does not preclude intervention.[4] Clearly the adverse positions taken by the United States and Ms. Faulkner on petition for certio-

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[4] *See Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538-39 (1972) (concluding that "sufficient doubt about the adequacy of representation [existed] to warrant intervention" by a union member where the Secretary of Labor had two different, "related but not identical" duties: to serve union members and to protect the public interest); *In re Sierra Club*, 945 F.2d 776 (4th Cir. 1991) (denial of intervention re-

(Footnote continues on following page)

rari constitute an adversity of interest between the parties, even under the standard advocated by Respondents in the cases cited on pages 6-7 of their Opposition. The United States, recognizing that the interests of the United States and the individual plaintiffs have already diverged, supports Nancy Mellette's motion to intervene in the district court. A Department of Justice trial attorney described the United States' position during a hearing before the district court:

> We do enforce the law as we understand the law in light of what the priorities of the state are. But they are not necessarily the same interest [sic] as a private plaintiff or a private plaintiff class. So we generally work congenially with our fellow plaintiffs, but sometimes we make very different decisions.

September 23, 1994 Hearing Transcript ("Tr.") at 39-40. The Department of Justice attorney further described for the district court how political considerations, in civil rights cases as well as generally, can result in the United States' failing to take an appeal, or changing its view of the law in the middle of a case, or otherwise departing from the course followed by a private plaintiff. *See* September 23, 1994 Hearing Tr. at 35-48; February 17, 1994 Hearing Tr. at 28 *et seq*.

Finally, Respondents erroneously assert that the requirement of adequate representation applies to permissive inter-

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(Footnote continued from preceding page)
versed on ground that state agency might not be adequate representative for citizen members of environmental group); *Dimond v. District of Columbia*, 792 F.2d 179 (D.C. Cir. 1986); *Sanguine, Ltd. v. United States Dep't of Interior*, 736 F.2d 1416 (10th Cir. 1984), *cert. denied*, 479 U.S. 1054 (1987) (denial of intervention reversed on ground that facts showed United States might not be adequate representative of private intervenors); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983) (denial of intervention reversed where facts showed United States might not adequately represent interests of private intervenors); *National Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381 (10th Cir. 1977).

vention as well as intervention of right. None of the cases cited by Respondents remotely supports this proposition. Their contention directly contradicts the language of Fed. R. Civ. P. 24(b)(2), which does not require any showing of inadequate representation.

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For the foregoing reasons, the Court should grant Ms. Mellette's Motion to Add Party or to Intervene and disregard Respondents' Memorandum Suggesting Mootness.

Dated: New York, New York
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FILED
SEP 11 1995
OFFICE OF THE CLERK

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In the

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JAMES E. JONES, JR., et al.,

Petitioners,

v.

SHANNON RICHEY FAULKNER,

Respondent,

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UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Court of Appeals properly exercised its discretion in concurring in factual findings by the district court, which were not appealed, concerning a state's proferred justification for a gender classification.

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STATUTES

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No. 95-258

In the

Supreme Court of the United States

October Term, 1995

JAMES E. JONES, JR., et al.,

Petitioners,

v.

SHANNON RICHEY FAULKNER,

Respondent,

and the

UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Shannon Richey Faulkner, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Fourth Circuit's Opinion in this case.

STATEMENT OF THE CASE

A. *Nature of the Case*

Shannon Richey Faulkner commenced this action under 42 U.S.C. § 1983 on March 2, 1993 in the United States District Court for the District of South Carolina, on behalf of herself and all others similarly situated, asserting that The

Citadel's males-only admission policy violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. She sought a permanent injunction compelling her admission to The Citadel's Corps of Cadets. In June 1993, the District Court granted the motion of the United States of America to intervene as a party-plaintiff.

On September 11, 1995, Nancy Mellette filed a motion with this Court to be added as a party or, in the alternative to intervene as a party in this petition and the petition for certiorari filed by Ms. Faulkner on July 11, 1995. Nancy Mellette is a South Carolina resident who is currently in her senior year of high school at Oak Ridge Military Academy, a military boarding school in Oak Ridge, North Carolina. Ms. Mellette is a Second Lieutenant in her cadet cadre, ranks fourth in her class and holds eleven letters in various sports. Her father attended The Citadel and is a member of the school's alumni association. Her brother is currently a senior at The Citadel. Ms. Mellette has long wished to join The Citadel's Corps of Cadets after her graduation from high school, and she is qualified in all respects for admission to the Corps, other than her gender. Upon widespread media reports of Ms. Faulkner's withdrawal from the Corps of Cadets, Ms. Mellette immediately stepped forward as a potential plaintiff in order to represent her own interests and those of similarly situated women in the continuing legal challenge to The Citadel's discriminatory admission policy. Ms. Mellette is also seeking to intervene as a plaintiff and to be designated as a class representative in *Faulkner v. Jones, Civ. Action No. 2:93-488-2*, pending in the United States District Court for the District of South Carolina.

B. *The District Court's Decision in Faulkner I*

The District Court issued an opinion on July 22, 1994, following a two-week evidentiary hearing on Shannon Faulkner's motion for summary judgment, holding that The Citadel's males-only admission policy violates the rights of Shannon Faulkner and other women to equal protection under the law as guaranteed by the Fourteenth Amendment.

Faulkner v. Jones, 858 F. Supp. 552 (D.S.C. 1994) ("Faulkner I"). The District Court found that the only remedy available to redress the violation of Shannon Faulkner's rights was to order her immediate admission into the Corps of Cadets.

In view of the decision of the United States Court of Appeals for the Fourth Circuit in *United States v. Commonwealth of Virginia*, 976 F.2d 890 (4th Cir. 1992), cert. denied, 113 S. Ct. 2431 (1993) ("*VMI I*"), the District Court limited the issues at trial on the summary judgment motion to (1) whether defendants could articulate any fact or argument that distinguished this case from the decision in *VMI I*; and (2) if liability were found, the appropriate remedy for the violation of the rights of Shannon Faulkner and other similarly situated women. Shannon Faulkner and the District Court accepted the findings and conclusions of *VMI I* as binding *solely* for the purposes of determining unresolved factual issues raised by Shannon Faulkner's motion for summary judgment. The District Court specifically reserved Shannon Faulkner's right to challenge at a future trial the alleged value of single-sex education, the asserted pedagogical value of The Citadel, or any other issue that distinguishes The Citadel from VMI. *Faulkner I*, 858 F. Supp. at 555 n.5[1] (Appendix to Faulkner Petition for a Writ of Certiorari ("Faulkner Appendix" at 36a).

The District Court found that The Citadel offered a military-style education that is not available at any other institution in South Carolina. *Faulkner I*, 858 F. Supp. at 556 (Faulkner Appendix at 38a). It further found that The Citadel is the only single-sex public college in South Carolina. The District Court expressly rejected defendants' argument

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[1] The Court of Appeals conceded that the District Court did not try either of these issues, but rather preserved the right of Shannon Faulkner and the United States to offer evidence disputing the alleged pedagogical benefits of The Citadel's single-sex program or any other issue that distinguished The Citadel from VMI. *Faulkner v. Jones*, 51 F.3d 440, 444 (4th Cir. 1995) ("*Faulkner II*") (Faulkner Appendix at 6a).

that the exclusion of women from The Citadel was justified by a state policy favoring single-sex education, where sufficient demand existed, as part of a diverse educational system. *Id.* at 564 (Faulkner Appendix at 53a-54a). The District Court made no finding that South Carolina had a policy of providing single-sex education; instead, it found that each of the formerly single-sex colleges in the state has become coeducational, except for The Citadel. *Id.* at 560 (Faulkner Appendix at 46a-47a).

Even if demand were somehow relevant, the District Court found that petitioners had not offered any evidence that single-sex educational opportunities are not available to women in South Carolina because there is insufficient demand for them. *Id.* at 564 (Faulkner Appendix at 54a). While petitioners argued that Winthrop College, a former public college for women, decided to admit men due to a lack of demand for single-sex education, the District Court found that the evidence did not support that assertion. *Faulkner I*, 858 F. Supp. at 566 (Faulkner Appendix at 58a-59a); *Faulkner II*, 51 F.3d at 445-446 (Faulkner Appendix 7a-9a). The District Court found that "no survey has been conducted to determine . . . how many women would be interested in pursuing a public single-sex education" and that "[t]he interest of South Carolina women in attending a Mary Baldwin-type program [such as was approved in *VMI II*] is unknown." *Faulkner I*, 858 F. Supp. at 560 (Faulkner Appendix at 46a). The District Court found that defendants had not offered any evidence as to the number of women interested in attending a single-sex college; in contrast, between twenty and fifty women would join the Corps of Cadets each year if women were admitted to The Citadel. *Id.*[2] Moreover, the District Court noted that the

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[2] In their statement of facts, petitioners recite certain factual findings regarding an alleged lack of demand among women contained in a report issued by the South Carolina Legislative Study Committee on Single-Gender Educational Opportunities for Women. See Petition at 9. Petitioners fail to disclose that the District Court excluded the Committee's

(Footnote continues on following page)

United States Supreme Court "continues to clearly proclaim that those rights created by the Equal Protection Clause of the Fourteenth Amendment are personal, individual rights" that cannot be denied based upon the number of other persons who seek access to a state benefit. *Id.* at 565 (Faulkner Appendix at 57a).

Turning to remedy, the District Court found that the only available means to redress the violation of Shannon Faulkner's rights was to order her immediate admission into the Corps of Cadets program. *Id.* at 568 (Faulkner Appendix at 62a-63a). The District Court's remedial order was supported by a series of specific findings. The District Court found that defendants refused to propose or develop any remedial plan, and that the so-called "remedial plan" offered by defendants "does not select any one remedy or even prioritize those suggested." *Id.* at 561 (Faulkner Appendix at 47a). Even after the District Court denied their motion to bifurcate the liability and remedial phases of the trial, petitioners refused to propose any remedy prior to trial, and instead unilaterally advised the District Court that they would file a specific plan 60 days after a determination of liability. The court found that "no effort has been made to determine the feasibility of any specific remedy" or even to contact the state legislature about the plan. *Id.* at 561 (Faulkner Appendix at 47a). The District Court further found that "[n]ot once has a defendant done anything to indicate that it is sincerely concerned to any extent whatsoever about Faulkner's constitutional rights." *Id.* at 567 (Faulkner Appendix at 61a-62a).

(Footnote continued from preceding page)

report from admission into evidence at trial. Tr. Vol. XIX, 67:13-17; 61:4-63:16; *see also* JA 441-442. The District Court held that the report was inadmissible under Rule 804(8)(c) of the Federal Rules of Evidence. The court found that the report did not qualify as the report of a public office or agency, and that the committee had not been granted authority by law to investigate the matters discussed in the report. In addition, the district court ruled that the report lacked trustworthiness, based primarily on the circumstances of the committee's formation and composition, both of which were dominated by Citadel alumni.

In addition, the District Court found that The Citadel could not afford to go private, and that it would take up to ten years before a new institution could be completed. *Id.* at 561 (Faulkner Appendix at 47a-48a). Under all of these circumstances, the District Court held that Shannon Faulkner was entitled to immediate admission into the Corps of Cadets and entered a final judgment on August 5, 1994, specifying the details of her admission. *See* Order of District Court dated August 5, 1994 (Faulkner Appendix C). In its order, the District Court did not require any changes in The Citadel's structure, methodology or physical standards. The Fourth Circuit granted defendants' application for a stay in a 2-1 decision, without written opinion. August 12, 1994 Order of the Fourth Circuit (Faulkner Appendix G). Judge Hall filed a dissenting opinion. *Id.*

C. *The Court of Appeals' Decision in Faulkner II*

South Carolina did not appeal any of the factual findings of the District Court. Instead, it raised two narrow issues on appeal: (1) whether the District Court erred by analyzing the Citadel's males-only policy as a facially discriminatory gender classification; and (2) whether the District Court erred in ordering the immediate admission of Shannon Faulkner into the Corps of Cadets. Petitioners did not raise either of the grounds for certiorari asserted in their petition for a writ of certiorari.

On April 13, 1995, the court of appeals affirmed the District Court's decision that The Citadel's males-only admission policy violates the right of Shannon Faulkner and other qualified young women to equal protection. It held that South Carolina provides men with a unique and valuable military-style education at The Citadel, while denying women any comparable opportunity. *Faulkner II*, 51 F.3d at 451 *(Hall, J. concurring)* (Faulkner Appendix at 19a-20a). The court of appeals did not rule upon the legal issue of whether an absence of demand among members of one gender may justify offering single-gender education to that gender. Instead, the

court of appeals held that "we concur in the District Court's finding that the defendants failed to present evidence supporting an absence of demand." *Faulkner II*, 51 F.3d at 444-45 (Faulkner Appendix at 8a). The court of appeals explained that "[a]s the attorney representing South Carolina was required to concede at oral argument, there really is no data before this court to support a finding of an absence of demand among women of the present time *for single-gender education of any type.*" *Id.* (emphasis added) (Faulkner Appendix at 8a-9a).

The court of appeals also affirmed the District Court's ruling requiring the admission of Shannon Faulkner into the Corps of Cadets in August, 1995, unless defendants could propose and implement an alternative remedy that met with the approval of the District Court before that time. It held that South Carolina had failed to propose any remedy for Shannon Faulkner or other women, despite being on notice since 1992 that such action was required. *Id.* (Faulkner Appendix at 14a). The court of appeals concluded that:

> [A] . . . state may not contrive to ignore a clear judicial mandate finding a constitutional violation and still retain the opportunity to select its course of remedy. This principle applies with even greater force in a case such as this, which was filed over two years ago by an individual plaintiff who is presently in the midst of her college career and for whom *time is of the essence*. (Emphasis added.)

Id. at 450 (Faulkner Appendix at 17a). However, the Fourth Circuit held that "in view of the lapse of time caused by the prosecution of this appeal and the complexity of these issues," it was "impracticable" for South Carolina to develop, implement, and obtain judicial approval for a remedial plan for other women by August 12, 1995, as originally ordered by the District Court. *Id.* at 448 (Faulkner Appendix at 15a). It directed the District Court to set a new schedule for the review and implementation of a remedial proposal.

In a concurring opinion, Judge Hall concluded that the only remedy possible was the integration of women into VMI and The Citadel. He rejected the assumption that *Faulkner* and *VMI* are about single-gender education, concluding instead that they "have very much to do with wealth, power, and the ability of those who have it now to determine who will have it later." *Id.* at 451 (Faulkner Appendix at 20a). Judge Hall observed that the Fourth Circuit decisions in this case "promoted a means to an end—single gender education—to the status of an end in itself and avoided ascertaining, let alone analyzing, the true purpose behind the state's decision to keep women out of VMI." *Id.* (Faulkner Appendix at 19a).

South Carolina did not seek reconsideration of the order of this Court, nor move for a stay of the mandate, which issued on June 5, 1995.

D. *South Carolina's Remedial Proposal and District Court Scheduling Order Issued on July 24, 1995*

Failing to heed the warning of the Fourth Circuit that time was running out, South Carolina delayed for nearly two months before submitting a five-page remedial plan to the District Court on June 5, 1995, which defendants amended on June 16. July 24, 1995 Order of the District Court (Appendix A to Faulkner's Brief In Opposition). Defendants propose to create a non-military leadership program for women at Converse College, a private women's college in Spartanburg, South Carolina. *Id.* at 5.

On July 24, 1995, the District Court issued a written order scheduling a hearing on the remedial proposal to commence on November 6, 1995. The District Court found that South Carolina and The Citadel refused to cooperate in expediting discovery and, by their conduct, made it impossible to schedule a hearing on their remedial proposal before August 12. Rather than expedite discovery, as they had promised, defendants "continued to make the plaintiffs dig for every piece of information they get." *Id. at 10a.* The District

Court explicitly found that defendants had failed to respond to legitimate requests for discovery, requiring plaintiffs to move on three occasions to compel production of documents and interrogatory responses. It held that:

> Instead of speeding the discovery process up, they have slowed it down. Instead of being open and fair as they promised, it has been business as usual for the defendants. They have failed to respond properly to discovery requests in violation of the rules of this court, and they have made legitimate objections to discovery that seem to serve little or no useful purpose for them but delay the completion of discovery significantly.

July 24, 1995 Order (Appendix A to Faulkner's Brief In Opposition). The District Court concluded that "the case is not even near being in a position to try at this time. The parties need at least several more months to prepare." *Id.*

E. *Supreme Court Review in VMI II and Faulkner II*

On May 26, 1995, the United States filed a petition for certiorari seeking review of the Court of Appeals' remedial decision in *VMI II*. The petition presents the issue of whether the facts and circumstances in *VMI II* justify a separate program for women at Mary Baldwin College. On July 10, 1995, Shannon Faulkner filed a petition for certiorari seeking review of the remedial aspect of the decision permitting South Carolina to remedy the unconstitutional exclusion of women from The Citadel by creating a separate and intentionally unequal program for women. After the District Court on June 28, 1995 scheduled a hearing on July 11 to consider whether to extend discovery beyond August 12, The Citadel sought and obtained an extension of time for presenting a petition for a writ of certiorari in this case.

F. *Application to Stay The Mandate*

On August 2, 1995, petitioners filed a motion to recall and stay the mandate of the Court of Appeals decision of April 13, 1995, which issued on June 5, 1995. The Fourth Circuit denied that motion on August 8, 1995. Petitioners filed a second emergency motion to stay the admission of Ms. Faulkner with the Court of Appeals on August 3, which the Court of Appeals denied on August 9, 1995.

Applicant filed an Emergency Application for a stay with Chief Justice Rehnquist on August 7, 1995. The Chief Justice denied the application on August 11, 1995 (Appendix B to Faulkner's Brief in Opposition). Petitioners refiled their application for a stay with Justice Anton Scalia, who denied the application on that same day.

PETITIONERS ARE NOT ENTITLED TO A WRIT OF CERTIORARI

Petitioners assert that the decision below presents two questions worthy of certiorari: (1) whether the courts below exceeded their jurisdiction in this case by adjudicating the constitutionality of South Carolina's failure to provide an all-female program like The Citadel; and (2) if not, whether a lack of demand for an all-female military-style program justifies the State's failure to provide such a program. Neither of the questions is remotely presented by the decision below. Petitioners fundamentally misrepresent the holdings and analysis of the Fourth Circuit, omitting any reference to the court's determination that the exclusion of women from The Citadel is unconstitutional, to connect grounds for review where none exist. Their misstatements of law fatally undermine the basis for their petition.

The court of appeals unambiguously affirmed the holding of the District Court "that South Carolina and The Citadel are in violation of the Equal Protection Clause" and "are denying Ms. Faulkner equal protection of the laws in violation of the Fourteenth Amendment." *Faulkner II*, 51 F.3d at 446, 442 (Faulkner Appendix at 9a). Both of petitioners'

purported grounds for seeking certiorari, however, are premised upon their repeated misrepresentation of the decision below as having held that the males-only admission policies of VMI and The Citadel were constitutional. Petitioners erroneously assert that "[t]he court of appeals . . . concluded that The Citadel's males-only admission policy satisfies the equal protection standard established by this Court in *Hogan*," Citadel Petition at 13, and that, in *VMI I*, the court "[concluded] that VMI's males-only admission policy is constitutionally justified . . ." Citadel Petition at 4. Quite clearly, if petitioners were correct, there would have been no remedial proceedings in either case, and petitioners would not have filed this petition.

Petitioners likewise misrepresent that "the courts below required applicants to justify the State's failure to establish an all-female military program like The Citadel Citadel Petition at 8, 16-17," and adjudicated the question of whether South Carolina was "constitutionally obligated to provide an all-female military program like The Citadel." (*Id.* at 21). The District Court ordered a trial to permit defendants to offer evidence to establish any issue that defendants claimed distinguished themselves from the finding of liability in *VMI, and Faulkner*, and ordered a trial on remedy. 858 F. Supp. at 555 (Faulkner Appendix at 36a). Petitioners' claim that the court of appeals "concluded" that South Carolina was "constitutionally obliged" to provide an all-female Citadel is equally false. The court of appeals held that South Carolina "failed to present evidence . . . [of] an absence of demand." *Faulkner II*, 51 F.3d at 444-445 (Faulkner Appendix at 6a). It did not require South Carolina to create a separate program for women, but offered the opportunity to avoid the admission of women by proposing a "parallel" program for women. *Faulkner II*, 51 F.3d at 448 (Faulkner Appendix at 14a).

In another egregious misrepresentation, petitioners assert that the court of appeals found in *Faulkner II* that single-sex education was "pedagogically beneficial," that The Citadel's so-called "adversative method" is "pedagogically

justified," and that coeducation would destroy The Citadel's ability to provide these educational benefits. Citadel Petition at 28-29. To support its assertions, petitioners cite to *VMI*, 976 F.2d 890 (4th Cir. 1992) *cert. denied*, 113 S. Ct. 2431 (1993) which did not consider or address The Citadel. Petitioners blatantly substitute "The Citadel" for "VMI", deliberately misstating the holding of *VMI*. The court of appeals made these factual findings in *VMI*, but not in *Faulkner*. The District Court in *Faulkner* limited the hearing last May 1994 to those issues that defendants contended distinguished South Carolina from Virginia; it did not try the issue of whether single-sex education has value or whether coeducation would destroy The Citadel. (Faulkner Appendix at 67a-68a). The District Court explicitly preserved the plaintiffs' ability to raise "all of the VMI holdings" that were accepted solely for the proposes of determining plaintiff's motion for summary judgment. *Faulkner I*, 858 F. Supp. at 555 (Faulkner Appendix at 36a).[3]

Petitioners distort the court of appeals' decision beyond recognition. In addition, petitioners fail to establish that either question merits judicial review by this Court, as discussed below.

A. *There is No Question of Justiciability*

Petitioners do not dispute that Ms. Faulkner had standing to challenge her exclusion from The Citadel, but instead argue that the courts below "exceeded their jurisdiction in this case by reaching the issue of whether the absence of an all-female military program like The Citadel is constitutionally justified." Citadel Petition at 13. Petitioners erroneously assert that the court of appeals "concluded that The

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[3] The evidence in *Faulkner* is completely to the contrary. The Citadel's own witnesses admit that coeducation will not affect its ability to fulfill its mission, teach leadership, or instill honor in its cadets. Joint Appendix in the Fourth Circuit ("JA") 739, 757. At trial, a witness for The Citadel testified that women "could do everything that a male cadet can do." JA 237-238.

Citadel's males-only admission policy satisfies the equal protection standard established by this Court in *Hogan*" and that it *sua sponte* considered and adjudicated the issue of "whether South Carolina is constitutionally obliged, in light of The Citadel's males-only admission policy, to establish an all-female military program like The Citadel." Petition at 13-14. Petitioners acknowledge that they never raised this argument in the lower courts, prior to filing their application for a stay on August 7, 1995 to prevent Ms. Faulkner from joining the Corps of Cadets. Application for Stay at 6, n.3.

Petitioners' argument fundamentally mischaracterizes the decision below. The court of appeals did not conclude that The Citadel's males-only admission policy was constitutional, but explicitly reaffirmed the District Court's decision that "that South Carolina and The Citadel are in violation of the Equal Protection Clause." *Faulkner II*, 51 F.3d at 446 (Faulkner Appendix at 9a). Having found that petitioners "are denying Faulkner equal protection of the laws," the court of appeals concluded that South Carolina may attempt to remedy the violation by creating a separate, and intentionally unequal, program for women. *Id.* at 442 (Faulkner Appendix at 4a). The court afforded petitioners the option to establish a parallel program for women rather than admit women to The Citadel. Petitioners can hardly complain that the Court of Appeals provided them a choice of remedy.

The court of appeals did not *sua sponte* adjudicate the constitutionality of the absence of an all-female Citadel, as petitioners assert, but instead considered the absence of an alternative for women in evaluating the justification for the exclusion of women proffered by petitioners themselves. Under *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), gender classification is unconstitutional unless the state demonstrates that it is substantially related to an important governmental objective. Petitioners argued below that the exclusion of women from The Citadel is substantially related to a policy of "diversity in education, which includes

single-sex institutions where there is sufficient demand to support the same." *Faulkner I*, 858 F. Supp. at 560; Faulkner II, 51 F.3d at 445 (Faulkner Appendix at 44a-45a, 8a). Petitioners argued further that the absence of any military-style education for women in South Carolina was justified by a lack of demand among women for a single-sex education.[4] The courts below considered, and rejected, that proffered justification. *Faulkner II*, 51 F.3d at 446 (Faulkner Appendix at 9a).

Having squarely presented this very issue to justify their discriminatory admissions policy, petitioners cannot now complain that the court of appeals "sua sponte" raised the issue or exceeded its jurisdiction in considering whether it satisfies the requirements of the Equal Protection Clause. To the extent that petitioners claim that the courts below "exceeded" their jurisdiction, none of the cases cited by petitioners addresses that issue. *Allen v. Wright*, 468 U.S. 737, 753 n. 19 (1984). Instead, the cases consider whether particular plaintiffs lacked standing to commence an action in the first instance.

The Article III requirement of a "case or controversy" is amply satisfied in this case. Petitioners concede that Ms. Faulkner has standing to challenge her exclusion from The Citadel. Citadel Petition at 20. "In essence the question

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[4] Petitioners argue that the relevant lack of demand is for a women-only educational program that exactly mirrors The Citadel. Petition at 28. Petitioner's own counsel, however, conceded in oral argument before the court of appeals that there was no evidence of a lack of demand "for single-gender education of any type." *Faulkner II*, 51 F.3d at 446 (emphasis added). Petitioners did not raise this argument in the courts below and, in fact, took the opposite view at trial, where they argued that the absence of demand among women for a single-gender education caused Winthrop College, a liberal arts college for women, to admit men in the mid-1970's. See *Faulkner I*, 858 F. Supp. at 445. Further, petitioners now contend that South Carolina can remedy the violation by providing a non-military program for women at Converse College, which does not remotely resemble The Citadel.

of standing is whether the litigator is entitled to have the court decide the merits of the dispute or of particular issues." *Allen v. Wright*, 468 U.S. 737, 751 (1984). A plaintiff must have suffered a violation of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The injury must be "fairly traceable" to the challenged action of the defendant, and likely to be redressed by the requested relief. *Allen*, 468 U.S. at 751.

In this case, Ms. Faulkner applied and was accepted to The Citadel. Petitioners "admit that, except for her sex, Faulkner is qualified to be a member of the Corps of Cadets." *Faulkner I*, 858 F. Supp. at 555 (Faulkner Appendix at 37a). The Citadel revoked its acceptance solely because she was female. Ms. Faulkner plainly suffered an "actual or imminent" injury that was "fairly traceable" to that unconstitutional admissions policy. *See Lujan*, 504 U.S. at 560.

The fact that Ms. Faulkner did not seek an all-female program does not deprive the plaintiffs of standing, or the courts below of jurisdiction. The "redressibility" component of the standing inquiry "examines the causal connection between the alleged injury and the judicial relief requested." *Allen*, 468 U.S. at 753 n. 19. Ms. Faulkner requested admission to The Citadel, which surely would remedy her unlawful exclusion. Moreover, this Court held in *Heckler v. Mathews*, 465 U.S. 728, 739-740 & n.8 (1984), that the possibility that a court may order remedial relief not sought by a plaintiff does not affect his or her standing to challenge a policy that violates the right to equal protection. In *Mathews*, the male plaintiff challenged the provision of spousal benefits under the Social Security Act to women, but not to men. While the plaintiff asked the Court to extend the benefits to men, this Court held that the government could remedy the violation by extending the benefits or withdrawing them entirely. The challenged legislation contained a severability clause which provided that the benefits automatically would be withdrawn if the statute was found unconstitutional. This Court held that

the male plaintiff nonetheless had standing to maintain the action, even though the only available relief was to terminate the disputed benefits. *Mathews*, 465 U.S. at 737.

B. *The Decision Below Rejecting Petitioners' Justification Based Upon an Alleged Lack of Demand Among Women for Single-Sex Education is Solely Fact-Based and Does Not Warrant Certiorari*

Petitioners do not offer a single reason why this Court should grant certiorari to review the factual determination of the courts below that petitioners failed to offer evidence of any alleged "lack of demand" among women for single-sex education in South Carolina. The holding below is purely fact-bound and does not merit certiorari. Even if the court of appeals ruled as a matter of law that a state cannot deny a person equal protection based upon the number of persons who seek access to a state program, petitioners have failed to identify any decisions of this Court, or any other court, which would conflict with that proposition. The question presented is entirely meritless and unworthy of review by this Court.

Petitioners concede that the court of appeals did not rule on the legal issue of whether an absence of demand among members of one gender may justify offering single-gender education to that gender. Instead, the court of appeals held that "we concur in the District Court's finding that the defendants failed to present evidence supporting an absence of demand." *Faulkner II*, 51 F.3d at 444-45 (Faulkner Appendix at 8a). Both lower courts rejected their claim that "single-sex educational opportunities are not available to women in South Carolina's public system of education because there is insufficient demand for them." *Faulkner II*, 51 F.3d at 444 (Faulkner Appendix at 6a) (quoting the District Court). The District Court found that "no survey has been conducted to determine . . . how many women would be in-

terested in pursuing a public single-sex education" and that "[t]he interest of South Carolina women in attending a Mary Baldwin-type program [such as was approved in VMI II] is unknown." *Faulkner I*, 858 F. Supp. at 560 (quoted in *Faulkner II*, 51 F.3d at 445 n.2) (Faulkner Appendix at 6a). While petitioners argued that Winthrop College, a former public college for women, decided to admit men due to a lack of demand for single-sex education, both lower courts found that the evidence did not support that assertion. *Faulkner I*, 858 F. Supp. at 566; *Faulkner II*, 51 F.3d at 445-446 (Faulkner Appendix at 8a-9a).

The court of appeals concluded that, in light of these findings, petitioners simply "failed to present evidence [supporting] an absence of demand." *Faulkner II*, 51 F.3d at 445 (Faulkner Appendix at 6a). The court of appeals held that:

> Thus, even though it is South Carolina's currently announced policy to provide single-gender education to both men and women and to allow gender-neutral factors, including demand and institutional autonomy, to determine whether public single-gender education will in fact be provided to each gender, this policy cannot justify the state's failure to offer single-gender education to women *when an absence of demand among women for such education has not been demonstrated.*

Id. at 446 (Faulkner Appendix at 9a).

As the Fourth Circuit concluded, there is no need to address the legal merits of petitioners' proferred justification in the absence of any convincing evidence to support an alleged "lack of demand" among women. *See Faulkner* II, 51 F.3d at 446 (Faulkner Appendix at 8a). The factual findings of the courts below are entitled to great deference and this Court is unlikely to reverse them on appeal. *See Graver Tank & Mfg. Co. Inc. v. Linde Air Prods. Co.* 336 U.S. 271 (1949).

Certiorari is not an appropriate vehicle to review factual determinations of lower courts.

Even assuming *arguendo* that the court of appeals had held that an absence of demand among women for a single-sex education does not justify denying women admission to The Citadel, petitioners have not identified a single decision of this Court, or any other court, that conflicts with that proposition. The absence of any doctrinal support for petitioners' novel defense is hardly surprising. Under the Fourteenth Amendment, a state may not "deny to any person within its jurisdiction the equal protection of the laws." This court repeatedly has held that the right to equal protection does not depend on the number of other members of a class that seek access to a program from which they have been excluded. *See, e.g., Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2100 (1995); *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419, 1433 (1994). A state may not deny a woman, or any individual, equal access to a state education by asserting that there is a limited or insufficient demand by others for an educational program. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938) (limited demand by blacks for legal education did not justify failure to provide law courses open to blacks); *Mitchell v. United States*, 313 U.S. 80, 97 (1941) (low demand by blacks for first class railroad transportation did not justify failure to provide equal facilities); *McCabe v. Atchison T. & S.F. Ry.*, 235 U.S. 151, 161 (1914) (same); *Carter v. School Bd.*, 182 F.2d 531, 535 (4th Cir. 1950) (small student population at black high school did not justify inferior curriculum); *see also Connecticut v. Teal*, 457 U.S. 440, 454-56 (1982) (law protects right of individuals to equal opportunity, not minority group as a whole) ("It is the individual who is entitled to the equal protection of the laws").

As this Court unambiguously explained in *McCabe*, the argument that lack of demand justifies a state's failure to provide an individual with the benefits afforded others "makes the constitutional right [to equal protection] depend upon the number of persons who may be discriminated against, whereas

the essence of the constitutional right is that it is a personal one . . . . It is the individual who is entitled to the equal protection of the laws." *McCabe*, 235 U.S. at 161; *see also Gaines*, 305 U.S. at 351. Indeed, this Court in *Hogan* declared Mississippi University females-only admission policy to violate the Fourteenth Amendment right to equal protection of a single male, and did not require him to show that other men sought or were interested in admission to Mississippi University for Women's nursing school.

Further, petitioners' lack of demand argument impermissibly makes an individual's access to her constitutional rights dependent on considerations of cost. The "vindication of . . . constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Watson v. City of Memphis*, 373 U.S. 526, 537 (1963); *Califano v. Goldfarb*, 430 U.S. 199, 217 *(1977)* (gender discrimination cannot be justified by cost or administrative convenience); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (same); *Reed v. Reed*, 404 U.S. 71, 76 (1971) (same).

Faced with an impenetrable wall of authority from this Court, petitioners conjure two arguments. They attempt to distinguish *Gaines* and *McCabe* on the grounds that those cases dealt with discrimination based upon race, not sex. Citadel Petition at 27. Petitioners also argue that "[s]eparation of the races does not confer any benefit," while "[s]eparation of the sexes in single-gender education has been proven to be pedagogically beneficial." *Id.* Neither argument has any merit. All of these cases were decided prior to *Brown v. Board of Educ.*, 347 U.S. 483 (1954), before racial classifications were inherently suspect. They do not turn on the level of scrutiny afforded a particular classification, but rather upon the nature of the right to equal protection. Contrary to petitioners' suggestion, these pre-*Brown* cases are particularly appropriate, as they were decided at a time when the law reflected a belief that separation of the races *was* beneficial and constitutional.

C. *Applicant's Petition Does Not Raise Any Issues of Exceptional or National Significance*

The Supreme Court is unlikely to grant certiorari to review the determination of liability by the Court of Appeals, having denied a similar petition for certiorari filed by VMI in 1993 to review the Fourth Circuit's determination that VMI's males-only admission policy violated the Fourteenth Amendment. *United States v. Commonwealth of Virginia*, 113 S. Ct. 2431 (1993).[5]

The court of appeals' decision represents a straightforward application of the *Hogan* test to the facts of this case. Those facts primarily involve The Citadel, an institution that petitioners have consistently described as "unique." *See* Citadel Petition at 4. The court of appeals' opinion was narrowly written, resting primarily on the absence of evidence of a 'lack of demand' among women for single-sex education. Thus, the liability determination in the decision below simply does not break any new ground.[6]

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[5] The fact that Shannon Faulkner in this case, and the United States in *VMI*, have filed petitions for certiorari hardly establishes that petitioners' petition will be granted. The United States and Shannon Faulkner challenge the remedial aspect of the Fourth Circuit's decision permitting a separate and unequal non-military program for women -- an issue which South Carolina is unlikely to raise in its petition. In fact, the defendants in *VMI* (represented by some of the same attorneys as South Carolina) have opposed the United States' petition for certiorari in *VMI*, arguing that the remedial issues in *VMI* do not raise important constitutional questions.

[6] In contrast, the portion of the decision in *Faulkner II* addressing remedy does raise important issues that justify certiorari. Unlike its discussion of liability, the remedial portion of *Faulkner II* diverges from the well-established equal protection analysis in *Hogan* and *J.E.B. v. State of Alabama*, 114 S. Ct. 1419 (1994) by creating a "special equal protection analysis" to review a state's remedial choice to create a "separate and unequal" program for women.

CONCLUSION

Applicant's petition for writ of certiorari is without any basis and should be denied.

Dated: New York, New York

Respectfully submitted,

September 11, 1995

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APPENDIX

APPENDIX A

United States District Court
District of South Carolina

Shannon Richey FAULKNER, Individually
and on behalf of all others similarly situated, Plaintiff,
and
the United States of America, Plaintiff-Intervenor,
v.
James E. JONES, Jr., Chairman, Board of Visitors of
The Citadel, et al., Defendants,

Civ. A. No. 2:93-488-2.

United States District Court,
D. South Carolina,

July 24, 1995.

ORDER

HOUCK, Chief Judge.

The plaintiff Shannon Richey Faulkner (Faulkner) instituted this action on March 2, 1993, claiming that the defendant Citadel's failure to admit her to its Corps of Cadets because of her sex violated her Equal Protection Rights guaranteed by the Fourteenth Amendment to the United States Constitution. On June 7, 1993, the United States of America was permitted to intervene as a plaintiff to assert the rights of all qualified women to be admitted to the Citadel. The trial of this case began nonjury on May 16, 1994, in Charleston, South Carolina, and concluded on May 27, 1994. On July 22, 1994, the court filed its Findings of Fact, Conclusions of Law, and Order in the matter.

The court found that the all-male admissions policy of the Citadel violated the Equal Protection Rights of the plaintiff Faulkner and all other women otherwise qualified to be mem-

bers of the Corps of Cadets. As to the plaintiff Faulkner, it concluded that the only remedy available to satisfy her constitutional rights was immediate admission to the Corps of Cadets. As to other qualified women, the defendants were required to fulfill their constitutional rights by admitting them to the Corps of Cadets or providing an alternative remedy in time for the 1995-1996 school year. The defendants filed an appeal from the court's order of July 22, 1994, and the Fourth Circuit Court of Appeals stayed the same pending a decision on said appeal.

On April 13, 1995, the Fourth Circuit Court of Appeals affirmed the court's July 22, 1994 order. In so doing it made the following statement:

> ... we affirm the district court's conclusion that South Carolina and The Citadel are in violation of the Equal Protection Clause in offering, without sufficient justification, single-gender education only to males. We also affirm the substance of the district court's remedial order, but with the modification that it establish a timely but practicable schedule for South Carolina to formulate, adopt and implement a plan that conforms with the Equal Protection Clause, and if the plan is not court approved and implemented by the date in August 1995 when the Cadets are required to report, The Citadel must admit Shannon Faulkner to the Corps of Cadets as ordered by the district court.

Faulkner v. Jones et al., 51 F.3d 440, 450 (1995). On June 5, 1995, the defendants filed South Carolina's Proposed Remedial Plan in which they proposed the South Carolina Institute of Leadership for Women (SCIL) at Converse College as a parallel program satisfying the Equal Protection Rights of women desiring to be admitted to the Citadel. In said initial filing details of the proposed program were lacking. Amendments to the plan filed by the defendants on June 12, 1995, and June 16, 1995, provided additional details.

The court estimates that it will take a minimum of two weeks to try this matter and issue a ruling. If the court is to approve and implement the remedial plan before the cadets are required to report on August 12, 1995, therefore, a period of only six weeks will have been available to conduct discovery. Experience dictates that six weeks is not a sufficient period of time for discovery in a case such as this. Only the simplest of cases require such a short discovery period. The court would normally permit a minimum of from four months to six months of discovery in this case. From the very moment the remedial plan was filed, therefore, it had grave reservations about attempting to consider the plan before August 12, 1995.[1]

In spite of the foregoing, the court thought it was only fair to look into the matter and see what could be done, and it conducted a hearing in Charleston, South Carolina, on June 7, 1995, for that purpose. At that time the plaintiffs argued very strongly that it was impossible for them to be prepared to meet the August 12, 1995 deadline. The defendants, on the other hand, advised the court that they were going to provide the plaintiffs all discovery material they needed without delay and insisted there was sufficient time to dispose of the matter within the stated time frame. The court made it clear to the defendants that since their failure to file the proposed

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[1] This court has followed very closely the litigation involving Virginia Military Institute (VMI) and a remedial plan similar to the one proposed here by the defendants which was developed at Mary Baldwin College (MBC) in order to preserve VMI's all-male admissions policy. That plan was filed with the United States District Court in September 1993 and approved by that court on April 29, 1994, for implementation during the 1995-1996 school year.

remedial plan in a timely fashion[2] created the time problem now presented, they would be called upon to make an extraordinary effort to relieve the plaintiffs of the prejudice caused to them by the shortness of time. As stated, the defendants assured the court that they would do just that. Under such circumstances, the court decided that it would give the matter its undivided attention and keep an open mind as to what could be accomplished within the limited time available.

The various instruments of discovery "serve... to narrow and clarify the basic issues between the parties, and ... as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues." *Hickman v. Taylor*, 329 U.S. 495, 501 (1947). They make a trial in federal court "less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *U.S. v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). The general purpose of discovery in this court has been described as follows:

> The basic philosophy underlying this procedure was that prior to trial every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person, unless the information is privileged. The discovery procedures adopted in 1938 and expanded in ensuing decades enabled a party not only to narrow the issues and obtain evidence for use at the trial, but also to discover infor-

---

[2] The defendants have been on notice for a substantial period of time that they would ultimately be required to obtain court approval of a remedial plan such as the one they have now filed. Indeed, the Fourth Circuit Court of Appeals found that they were placed on such notice as early as October 1992. *Faulkner v. Jones*, 51 F.3rd 440, 447 (4th Cir. 1995). The message became louder and clearer on November 17, 1993, when the Fourth Circuit Court of Appeals first considered this case. *Faulkner v. Jones*, 10 F.3rd 226 (4th Cir. 1993). Then, in February 1994, this court required the defendants to present such a plan to it for approval. They failed to do so until June 5, 1995.

> mation about where and how such evidence could be obtained.

8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2001 (1994). Since its introduction, discovery has become ingrained in our system of federal jurisprudence. The right of a litigant to pursue discovery is an essential ingredient of a fair trial. Before a trial can be had in this case, or for that matter any case pending in this court, it must be clear that the parties have had a fair and reasonable opportunity to conduct discovery. Where that is controverted, as it is here, it is seldom easy to make such a determination. The attorneys almost always accuse each other of wrongdoing in the discovery process. The only way for the court to reach a sensible conclusion is for it to look at the substance of the discovery, the requests made therefor and the responses given to those requests, and that is precisely what the court must do in this case to determine whether or not there has been enough discovery to permit trial to proceed at this time.

The plaintiffs served their initial discovery requests on June 9, 1995. They consisted of 84 requests for the production of documents pursuant to Rule 34 of the Federal Rules of Civil Procedure and 41 interrogatories propounded pursuant to Rule 33 of the Federal Rules of Civil Procedure. Thereafter, the court had telephone conference calls with the parties on June 15, 1995, and June 20, 1995, and conducted hearings in Charleston, South Carolina, on June 22, 1995, July 11, 1995, and July 19, 1995, for the purpose of determining and resolving problems with discovery. Verbatim records were made of all the telephone conferences and the hearings. They reveal better than anything else how discovery has been conducted in this case, but the court believes that it will be informative to briefly review the same at this time.

At the June 15, 1995 conference, counsel for the defendants again assured the court that they were making every effort to comply with the requests for discovery made by plaintiffs. Attorney General Condon stated that "on the discovery side, we think that we will be in total compliance with these

matters, maybe by tomorrow. [W]e are well along with the discovery requests, and do not anticipate making any objections; if we do, there will be very few." Transcript Conf. Call June 15, 1995, p 14.

The telephone call of June 20, 1995 was scheduled to determine the status of discovery and schedule a hearing in Charleston, South Carolina to deal with any problems that existed. At that time the attorneys for the defendants advised that they had continued to meet the discovery requests of plaintiffs and had either fulfilled all of them or would do so very quickly. Counsel for the plaintiffs, however, disagreed with those assertions. They opined that the document productions made by the defendants were incomplete, and that the defendants had made no response to the interrogatories propounded on June 9, 1995.

At the June 22, 1995 hearing the court considered the specific objections the plaintiffs made to the document responses of the defendants.[3] They objected to 28 such responses, and the court went through each one with counsel for both sides. It was obvious that some errors in responses were inadvertent and probably resulted from an effort to do too much too fast. In other instances, however, the defendants simply failed to produce documents that were available and should have been produced. In the final analysis, the court ordered the defendants to supplement virtually all of the 28 responses objected to by the plaintiffs.

Another hearing was scheduled in Charleston on July 11, 1995. The defendants had, on or about June 30, 1995, filed answers to the interrogatories propounded by plaintiffs on June 9, 1995, and the sufficiency of those answers was considered then. The defendants interposed three broad objec-

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[3] It should be noted that we are dealing with literally thousands of pages of documents. It takes an enormous amount of time to compile them for production and probably even more time to review them upon receipt to determine if the production is adequate. Likewise, it takes the court a great deal of time to go through the requests and the productions carefully to determine if the latter are adequate.

tions to the plaintiffs interrogatories but, subject to the same, responded thereto. The court overruled said objections and examined each interrogatory and answer carefully. It then required the defendants to supplement their answers to approximately 8 of the interrogatories propounded by plaintiffs. There is considerable overlapping and duplication in the interrogatories, and the court consolidated some in making its ruling. It is, therefore, difficult to say exactly how many interrogatories were involved, but a good estimate would be that approximately one-third of the interrogatories needed to be supplemented.

At a hearing held in Charleston on July 19, 1995, the plaintiffs claimed that the defendants had not furnished the documents the court required to be produced on June 22, 1995. They also listed other documents that had been identified during discovery and needed to be produced.

The court previously concluded that a large number of the responses defendants made to the discovery requested by plaintiffs were inadequate, and it ordered the defendants to supplement the same. Those numbers alone, 28 requests for document production and approximately one-third of the interrogatories propounded, clearly show how the defendants have treated discovery since June 7, 1995, but a detailed explanation of a typical response will be further illustrative. Interrogatory Number One propounded by the plaintiffs for answer by the defendants asked the defendants to name all persons who took part in formulating the SCIL plan. In response, the defendants named a number of individuals. They also listed, "Counsel for the State of South Carolina", which is an improper answer because it fails to name a "person" as required by the question. Interrogatory Number Two required the defendants to state what each of the persons identified in answer to Interrogatory Number One did in helping to develop the SCIL program. As a part of its answer to that interrogatory, the defendants stated, the "contract with the State of South Carolina was negotiated by counsel for Converse, Dr. Thomas and George Dean Johnson, Chairman of the Converse Board of Trustees, with counsel for the State of South Caro-

lina." The attorneys for the plaintiffs said in open court that prior to the filing of the remedial plan on June 5, 1995 their only knowledge about the negotiations leading thereto was from news coverage of the same. They also said that they assumed from said coverage that Attorney General Condon represented the State of South Carolina in negotiating the SCIL contract with Converse College. Only when they deposed Attorney General Condon on July 17, 1995, did they learn to the contrary. The first question at that deposition attempted to learn the names of all persons involved in the negotiating and drafting of the contract between the State of South Carolina and Converse College. Thereafter, the following took place:

> Q. And what was your involvement in that process?
>
> A. My involvement? I felt my involvement was just starting it, getting it going, and more of a facilitator. I think one of the key people you want to talk to is Sam Applegate.
>
> Q. Now, who exactly--I understand he's an attorney one floor up above. Who was he representing during the process of negotiation of the contract?
>
> A. I hired him to, in effect, represent the State of South Carolina.
>
> Q. Do you have a contract for the provision of his services?
>
> A. Yeah. We worked it out. I say a contract. I don't know what the paperwork shows, but we worked it out with the Insurance Reserve Fund that he would submit his bills to this firm, I believe. I think that's the way it worked, and I don't know whether they require a form or a contract to be executed. I don't know, but I think what you'll find is that for

> all the particulars and the actual negotiation he would be the person who-- And as I recall, of course--this is a bit of a blur--it was just simply reported to me what was going on at times if I were in town. So he was basically the--I would call him the lead negotiator, in effect.

Deposition of Attorney General Condon, July 17, 1995 at p. 8. The contract negotiations between Converse College and the State of South Carolina are an important part of this case, and the defendants had to know that the plaintiffs wished to learn all details about the same through discovery. They also must have known that the plaintiffs were unaware of the role Sam Applegate played therein. Indeed, Attorney General Condon said at page 37 of the aforementioned deposition that one of the reasons he engaged San Applegate to conduct the negotiations was to keep the plaintiffs from knowing what was going on. In spite of all of these factors, however, the defendants deliberately withheld from the plaintiffs the important role Sam Applegate played in the contract negotiations when they were asked by the plaintiffs to furnish that information to them. Of course, the plaintiffs ultimately learned about Sam Applegate and will be able to depose him and learn everything he knows about the matter. In the process, however, valuable time has been wasted because the defendants failed to properly respond to the plaintiffs' interrogatories. When this scenario is repeated time after time, the discovery process is slowed to a standstill.

When South Carolina's Proposed Remedial Plan was filed on June 5, 1995, and the court began searching on June 7, 1995, for a way to consider approval and implementation of the same before August 12, 1995, it knew that such a goal would be difficult, if not impossible, to obtain. With the assurances made by the defendants that they would waive some objections and make a good faith effort to accelerate the discovery process, it seemed possible. In hindsight, it probably was possible. The problem is, the defendants have not done what they said they would. Instead of speeding the discovery

process up, they have slowed it down. Instead of being open and fair as they promised, it has been business as usual for the defendants. They have failed to respond properly to discovery requests in violation of the rules of this court, and they have made legitimate objections to discovery that seem to serve little or no useful purpose for them but delay the completion of discovery significantly.[4] In short, they have continued to make the plaintiffs dig for every piece of information they get. As a result, the case is not even near being in a position to try at this time. The parties need at least several more months to prepare. The court, therefore, reluctantly concludes that it cannot consider the issues relating to the approval and implementation of South Carolina's Proposed Remedial Plan prior to August 12, 1995.

The parties shall have until October 15, 1995 to complete discovery with the trial of all outstanding issues to commence on November 6, 1995.

AND IT IS SO ORDERED.

C. WESTON HOUCK
UNITED STATES DISTRICT
JUDGE

July 24, 1995
Charleston, South Carolina

[4] Two examples of such conduct that come to mind are their refusal to permit questions to be asked by the attorneys and experts of the plaintiffs upon visits to the Converse campus and the privilege-work product objections made during the depositions of Sandra C. Thomas and Anne Marie Whittemore.

APPENDIX B

August 11, 1995

Ms. Valorie Vojdik
Shearman & Sterling
153 East 53rd St.
New York, NY 10022-4676

Re: James E. Jones, Jr., et al.
v. Shannon Richey Faulkner, et al.,
Application No. A-127

Dear Ms. Vojdik:

The application for a stay of enforcement of a mandatory injunction pending filing and disposition of a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on August 11, 1995 denied the application.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By

Christopher W. Vasil
Deputy Clerk